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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

No. 515

RICHARD R. HARSHMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit, which court affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, (Honorable Julius J. Hoffman, District Judge) which judgment, after a verdict of the jury finding Petitioner guilty of violation of the Universal Military Training and Service Act, (Sec. 462, Title 50, App. U.S.C.), sentenced him into the custody of the Attorney General of the United States for a period of two years and six months and that he forfeit and pay a fine in the sum of One Thousand Five Hundred Dollars and cost of proceedings, and that he stand committed until the fine and costs are paid.

OPINION BELOW.

The opinion of the Court of Appeals of August 20, 1962, No. 13586, of the September Term, 1961, April session 1962, of that court, is not yet reported. It appears as Appendix A attached to this petition. Since that court ruled that the decision in *United States* v. *Parker*, 13585, controls the decision here, therefore, for the convenience of the court, we reprint the opinion in the *Parker* case similarly as part of Appendix A.

JURISDICTION.

The judgment and commitment of the trial court was entered on the 26th day of September, 1961 (18 U.S.C. 3231; 62 Stat. 826) the opinion of the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court (28 U.S.C. 1291; 72 Stat. 348). A petition for rehearing was filed within the time set forth by the Rules and this was denied by the United States Court of Appeals on the 14th day of September, 1962. This petition for a Writ of Certiorari is timely filed.

The statutory provision, believed to confer jurisdiction on this Court to review the judgment by a Writ of Certiorari, is 28 U.S.C. 1254 (1); 62 Stat. 928.

QUESTIONS PRESENTED.

1.

While there are subsidiary questions which the petitioner hopes this Court will decide, there is one main issue and that is: When the local board indicates on the record that the petitioner under the Selective Service Act is sincere and honest in his contention that he objects to combatant as well as to noncombatant service because of his religious training and belief nevertheless,

the local board exempts him only from combatant service and the appeal board does likewise, does the employment of petitioner by a candy factory as a salesman, a small part of the products of which is purchased by the armed forces, present a *basis in fact* for the board's denial of petitioner's full exemption from service?

II.

We read this court's decision in *Dickinson* v. *United States*, 346 U.S. 389; 74 S.Ct. 152, as holding that when a draftee establishes *prima facie* that he is entitled to the exemption claimed, the record must disclose matters "incompatible" with the *prima facie* case, otherwise there is no *basis in fact* for the denial of the classification claimed. Does the holding in the *Dickinson* case apply, as the Court of Appeals for the Seventh Circuit held, only to cases "which involved ministerial status", or does it apply to a conscientious objector as the petitioner is here?

III.

The Local Board here went on record in acknowledging petitioner's sincerity in his claim for full exemption based on religious training and belief.

The Local Board nevertheless refused him 1-O classification because—as one Board Member stated, ". . . I don't believe there is any such thing as a real Conscientious Objector. I believe that any person who lives in America or makes his living in this country should be willing to fight for his country." (Exh. 8) Can such an illegal conduct of the Local Board be overcome by the Appeal Board's classification *de novo* (resulting in the same denial) in face of petitioner's claim of lack of due process?

IV.

When the government is permitted to put into evidence based on gossip, unsupported, mainly hearsay matter, that the employing company sometime, somewhere manufactured some implements of war, but petitioner was prevented by the trial court to present evidence to the contrary, does such evidence presented by the government constitute *basis in fact* to support the Local and Appeal Boards' action denying petitioner's claim for exemption which claim was supported by his evidence *prima facie*?

V.

The government in this case introduced into evidence the Selective Service file of petitioner. The trial court precluded him to question the validity and truthfulness of the content of some of those documents. Was there a prejudicial error in such denial of petitioner's right to examine and offer evidence as to such documents and was it further a prejudicial error when the trial court permitted the jury to take with it the Selective Service file, or was there no prejudice as the Court of Appeals held "since the jury had already heard oral testimony of the substance of its (Selective Service) contents."

VI.

The Selective Service file introduced by the government included the recommendation of the Department of Justice addressed to the Appeal Board. This recommendation referred to the Hearing Officer's report to the Department. Petitioner challenged the truthfulness of the recommendation as far as it referred to the Hearing Officer's report. His request to the Court to order the production of the Hearing Officer's report was denied by the Trial Court. Was this a prejudicial error contrary to the holding of the Court of Appeals?

STATUTES AND REGULATIONS.

(Because of the length they appear more conveniently in Appendix B hereto attached)

1. 50 U.S.C. 462 (62 Stat. 622)
2. Rule 1622.1 of Selective Service Regulations.
3. Rule 1622.2 of Selective Service Regulations.
4. Rule 1622.11 of Selective Service Regulations.
5. Rule 1622.14 of Selective Service Regulations.
6. Rule 1622.16 of Selective Service Regulations.
7. Rule 1626.25 of Selective Service Regulations.

STATEMENT OF THE CASE.

Petitioner was indicted for having violated Sec. 462, Title 50, App. U.S.C. (Universal Military Service and Training Act) and was charged with having refused to obey an order of induction issued from his local Selective Service Board 177 in Sullivan, Illinois. He pleaded not guilty and the case was tried before a jury. Evidence was heard and the jury found him guilty as charged and the Trial Court's judgment was that he be committed to the custody of the Attorney General for a period of two years and six months and that he pay a fine of One Thousand and Five Hundred Dollars and the cost of prosecution (pages 72, 73 of the Appendix in the Appeal filed before the United States Court of Appeals for the Seventh Circuit hereinafter referred to as (Ap. pp. 72, 73)). Petitioner appealed from the judgment to the United States Court of Appeals for the Seventh Circuit on various grounds and the Court of Appeals affirmed the judgment of the Trial Court (Appendix A).

In the presence of the jury, government attorneys identified and offered into evidence petitioner's Selective

Service file. To many of these documents petitioner objected, however, the objections were overruled and the file was admitted into evidence (Ap. 11).

The petitioner was identified by government witness as the person who appeared at the Induction Center and that when he was asked to take a step forward indicating his induction into the armed forces he remained perfectly still (Ap. 18).

Upon the government's resting its case petitioner moved for a judgment of acquittal which motion was denied (Ap. 22).

Petitioner in presenting his defense moved for an order upon the government to produce Government Hearing Officer (Brittingham's) second letter to which reference is made in the recommendation of the Department of Justice to the Appeal Board and which was introduced as Exhibit B-18 and B-36. The motion was denied (Ap. 25, 26). Petitioner then moved that the court order the government to produce the hearing officer's report so referred to in Exhibit B-18 and B-36 for perusal by the court *in camera*. Said motion was also denied (Ap. 27).

Petitioner called his Local Draft Board Clerk and the government objected to the questions whether the clerk ever heard any one of the Draft Board members expressing an opinion as set forth in Exhibit B-8, introduced by the government to the fact that the Board member did not believe "that there is any such thing as a real Conscientious Objector" (p. 31); the question whether this clerk heard any draft board member express an opinion to the effect that "any person who lives in America or makes his living in this country should be willing to fight for his country," (p. 3) irrespective of his religious objections to war and whether the Board while the clerk was

so employed, ever gave anybody a classification of 1-O. Objections to questions were sustained (Ap. 28, 29). Petitioner offered into evidence the testimony of Felix Hagerman who is now and was for the past 15 years connected with the Community Industries, Limited, of Sullivan, Illinois which company employs petitioner. This witness was executive vice president and treasurer of the company (Ap. 29-32).

The question whether the witness knows the products manufactured by the company during the past 15 years was objected to by the government, the objection was sustained, and the jury was instructed to disregard the answer (Ap. 33). Witness testified that petitioner is a member in good standing of the Church of Jesus Christ of Sullivan, Illinois and that he knows the tenets of the church, however, the government objects to the question whether or not in accordance with the tenets of the church a member in good standing would ever manufacture ammunition. The objection was sustained (Ap. 33). Petitioner offered proof to effect that if witness Hagerman would have been permitted to answer questions he would have testified that as executive vice president of Community Industries, Ltd., he knows that the Church of Jesus Christ never manufactured anything. All manufacturing was done by the company. The items manufactured were candy, ladies' dresses, tents, garden tractors, snow removing tractors and such things. That to this witness's knowledge the company never manufactured any war goods. That all items manufactured by it were for civilian consumption though some of the candy was bought by the government. That he understands the teachings of the church to which petitioner belongs and that no member in good standing would ever manufacture items which would be used for destructive purposes. That they would not manufacture bullets, machine guns, tanks, etc.

The government objected to the offer of proof and the offer was rejected by the court (Ap. 35-37).

Petitioner testified that he is 26 years of age and that the founder of the Church of Jesus Christ was his great-grandfather and that the present pastor is his great aunt. He is a member of the same church and attends services regularly twice a week. So do his parents and three sisters.

At the time when he registered for the draft at the age of 18 he was working for Community Industries, Ltd. assembling piece goods in the dress factory. While he worked there, there were three items manufactured, namely, cooks' coats, mattr ss covers and a cooling suit made up of several layers of perforated material. At the present time he is employed in the candy division. He was also employed in the garden tool division where they manufactured garden tractors (Ap. 38, 39).

When petitioner went to work in the candy division of the company after school in his senior year in high school, first he worked as a janitor, then he worked feeding choeolate bars into an enrober; then he worked on a machine which puts sugar coating on the candy. After he finished high school he was given a job as a salesman in the candy division. At the time of the trial he was a factory representative and he dealt with brokers who do the direct selling of the candy for the company (Ap. 40). The question whether he ever sold any candy to the armed forces was objected to by the government and the objection was sustained (Ap. 40).

He completed the necessary Selective Service forms and he asked for a 1-O classification so that he would be fully exempted from military service. He was given a 1-A-O classification, that is, military service in non-combatant

capacity. He appeared before his Local Board and after his appearance he prepared a summary of the discussion, which document was introduced by the government as Exhibit B-11. The petitioner remembered Board member Clancy with whom he talked during his personal appearance but the government objected to the question pertaining to the conversation with the Board member. The objection was sustained (Ap. 40-41).

Petitioner read government Exhibit B-36, however, the question whether the statement therein attributed to him is correct was objected to by the government and objection was sustained (Ap. 42-43).

Petitioner was asked whether he stated to the Government Hearing Officer that it is not a violation of his Christian duty to manufacture goods for military consumption; he was asked whether he would be willing to be employed in a plant which manufactured guns; he was asked whether in case his employing company would decide to manufacture poison candy bars to be handed out to this country's enemies would he then be willing to remain employed. The government objected to all those questions. Objections to all questions were sustained (Ap. 42, 43).

Petitioner made an offer of proof that if he would have been permitted to answer the questions to which objections were made and sustained he would have answered with reference to government Exhibit B-36 that the same is false in the following particulars:

"It is false that the hearing officer in 1954 concluded that because of his employment for a concern producing material for military consumption he failed to sustain his claim objecting to noncombatant service; it is false that the Department of Justice concurred with the Hear-

ing Officer in his recommendation to give him 1-A-O classification, but to the contrary, the fact is that the Hearing Officer accepted the recommendation of the Department of Justice that no member of the Church of Jesus Christ be given 1-O classification; it is false because he did not make a statement that it is not a violation of his Christian duty to manufacture goods for military consumption; to the contrary, the fact is he told the Hearing Officer that the company that employed him for the past 8 years never manufactured anything other than civilian consumer goods although a small part of it may have been purchased by the government; it is false because he did not state to the Hearing Officer that he does not accept the responsibility for the actions of persons who use the products of his company, to the contrary, the fact is he stated the company manufactured civilian goods and that a person could not do anything in this country if he were to refuse to work on items that could be used for military purposes. In that case, a person could not raise corn or wheat for bread because that might be fed to the members of the armed forces (Ap. 43, 44).

As part of the offer of proof, petitioner would have stated that his objection to participation in military service even in noncombatant form is based on the New Testament injunction that you shall "Love your enemies"; that he accepted the religious teachings and tenets of the Church of Jesus Christ (Ap. 45). That he knows that that church was never engaged in the manufacture of any merchandise because it is a spiritual organization and not a manufacturing establishment. Community Industries, Ltd. which employs him is an Illinois corporation owned by the stockholders and that this company, at least in the last 8 years while he was employed there

never manufactured any war goods. He does not know whether some of the mattress covers or cooling coats were purchased by the army however, during the last 4 years as a candy salesman he knows that he never sold any candy to any military establishment. All his customers are civilian stores (Ap. 45, 46). Petitioner's offer included the testimony that he owes the government any service that doesn't involve personal participation in war. When he appeared before his Draft Board and asked for a 1-O classification he believed that he was entitled thereto because the Draft Board never doubted his sincerity and honesty. The reason that he was denied 1-O classification as he was told by Board member Clancy and Naxton was because that Board member did not believe that there was such a thing as a real conscientious objector opposed to both combatant and noncombatant service (Exh. B-8 and B-29). Further reason why he was denied 1-O classification was that Board Chairman McNutt believed that to get such classification petitioner would have to leave the country (Exh. B-29, Ap. 46).

As part of the offer of proof, petitioner stated that when he appeared before Hearing Officer Brittingham in 1954, he was told by him that the Hearing Officer would recommend a 1-O classification for him but he cannot do it because he received a letter from the assistant Attorney General of the United States and pursuant to this letter he is precluded from granting him or any member of the Church of Jesus Christ 1-O classification. The Hearing Officer told him that he believed him to be sincere, honest and of undoubted integrity. That the Hearing Officer does not believe in 1-O classification but as long as it exists it should be given to petitioner and other members of his church. Substantially the same statement was made to petitioner when he appeared the second time before Hear-

ing Officer Brittingham in 1956 and the statement so made to him by Mr. Brittingham is contrary to the statement contained in government Exhibit B-36. The government objected to the offer of proof and objection was sustained (Ap. 47).

Petitioner then testified before the jury, however, the government objected to the questions whether at the time when he remained standing instead of taking the step forward as he was asked at the induction center did he thereby intend to violate any of the laws of the United States. Objection was made to the further question as to his reason for not taking the step forward which would have indicated his induction into the armed forces (Ap. 48). Thereupon, petitioner made an offer of proof that at the time when he failed to take the step forward he was very unhappy that he could not carry out that order and that he didn't intend to violate any law. However, he remained standing during the induction ceremony because to take the step forward would have been a clear violation of the Command of the Lord since he cannot participate in military service in any form. He was greatly disturbed and unhappy because he saw the conflict between the Command of the Lord and the command of man. His choice was unquestionably to follow the Command of the Lord. He had to do that irrespective of any penalty. Because the punishment to violate the Command of the Lord meant to lose salvation and that penalty is greater than any a human can mete out. Government objected and objection was sustained (Ap. 49).

The government objected to the question before the jury whether petitioner at the time when he was at the induction center and he was ordered to be inducted did he believe that the classification given to him was given in violation of the law. Thereupon he offered proof that

he was aware of Sec. 6(j) of the Universal Military Training and Service Act and he was aware that that law provides that a person who is, because of religious training and belief conscientiously opposed to military service in any form should be given in lieu of induction civilian work for 24 months. He knew that under the law and under his circumstances he was entitled to 1-O but that he was denied such classificatien because the Selective Service Boards and the Department of Justice were biased and prejudiced against him and against the members of his church. He also believed and knew that the induction order given to him based on the classification given to him, was not in accordance with the rules and regulations and the law. Government objected to the offer of proof and objection was sustained (Ap. 50-51).

Two witnesses in addition to witness Hagerman testified to petitioner's good reputation (Ap. 51), and thereupon petitioner rested his case and renewed his motion for a judgment of acquittal which motion was denied (Ap. 52).

Petitioner submitted instructions embodying Sec. 6(j) of the Act and also pertaining to the bias and prejudice of the Selective Service Boards, however, the instructions so proffered were refused (Ap. 54).

The jury found the defendant guilty as charged in the indictment (Ap. 67).

Petitioner moved for a new trial. The motion was denied (Ap. 67, 68).

The court entered a judgment on the verdict, however, it offered petitioner to vacate the verdict of guilty and dismiss the indictment against him provided he submits to induction in accordance with the classification given to him. Petitioner informed the court that he cannot accept the 1-A-O classification (Ap. 67, 68).

The Trial Court then stated that it is not impressed with the idealism and excessive zeal for any particular faith when a resourceful criminal lawyer is employed to do what petitioner's counsel had done in this case, despite this fact that the court is willing to let the petitioner serve in the classification given him. Defense counsel in replying stated that there was nothing improper done by petitioner in defending himself. The Trial Court then stated that its prior expression was not so much in criticism of defense counsel but that it seemed to the court that these church members who are willing to pay a resourceful criminal lawyer to do what he did for them do not have the lofty ideals that they pretend to have (Ap. 69).

Petitioner then asked the Trial Court that the sentence be suspended with the condition attached that he does work of national importance for 24 months.

Petitioner was given the opportunity to make a statement to the court and he said that he accepted the judgment of the court as the Lord's Will whom he praised for still being free in spirit and soul to praise Him for the Grace and Courage to witness for Him in this courtroom (Ap. 70, 71). He stated that it matters not where he goes since he is a Son of God and he will have His Love, His Holy Spirit going with him whether in the penitentiary or in the street, a sidewalk, or in a Courtroom. He is very thankful and happy for the opportunity to witness for Jesus Christ and for the salvation that He did give to mankind of which he partook. He accepts the Lord's Will and he knows that all good things work together for good to those that love the Lord and that nothing can separate him from the Love of God. He can serve his Maker in jail or at work.

Thereupon the Trial Court committed petitioner to the custody of the Attorney General for a period of 2 years and six months and fined him fifteen hundred dollars and costs of prosecution. He was permitted to remain on bail in the sum of five thousand dollars pending appeal (Ap. 70, 71).

REASONS FOR ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING SAME.

1) Petitioner submits that this case raises important questions as to the case law as well as the interpretation of the governing rules of administrative agencies as the Boards of Selective Service, which questions ought to be settled by this Court. We submit that at least one of the important and pertinent cases decided by this Court, *i.e.* the *Dickinson* case, which we understood as clearly settling the issues therein involved, was misread by the Court of Appeals for the Seventh Circuit since it put a greatly and, we say, prejudicially restrictive interpretation thereon and therefore, this Court ought to clarify the issue. There are other questions which have been decided by the various Circuit Courts of Appeals, but the instant decision of the Circuit Court of Appeals for the Seventh Circuit is in conflict not only with certain decisions of this Court and of other Circuit Courts, but it also conflicts with a prior case decided by the Seventh Circuit.

2) This Court never decided the important question which undoubtedly underlies the denial of petitioner's claim to exemption both from combatant and noncombatant service. This question is if a registrant, as petitioner, is found by the Selective Service Boards to be sincere and honest, and that his claim is based on religious training and belief, and if he is employed in a candy factory as a salesman and sales representative, which

factory sells a part of its product to the government, does that fact satisfy this Court's requirement as to basis in fact for the denial of the *prima facie* established case for full exemption from military service.

3) This Court never decided whether the so-called *de novo* classification by the Appeal Board which retained petitioner in the classification given to him by the Local Board satisfied the rule that the draftee is entitled to fair play on every step of the processing when the record discloses that the Local Board illegally denied petitioner's claim that was established *prima facie*.

4) Is it sufficient for the government to conjure up a basis in fact by presenting unfounded evidence as to the frame of mind of petitioner and particularly is that sufficient when the defendant is denied the right to present evidence contrary to that presented by the government.

5) Is it prejudicial error for the government to offer before a jury and for its perusal petitioner's Selective Service file and then for the Trial Court to refuse permission to him to question some of the documents in the file, and to refuse permission to him to present evidence contrary to some of the documents in the file?

6) Was it prejudicial error on the part of the Trial Court to refuse petitioner's request for an order upon the government to produce the report of the Hearing Officer to the Department of Justice when petitioner challenged the truthfulness of the Recommendation of the Department of Justice to the Appeal Board, as far as it referred to the report of the Hearing Officer, no part of which report was before that Board or the Court?

ARGUMENT.

I.

THIS COURT'S HOLDING IN THE DICKINSON CASE TO THE EFFECT THAT THE PRIMA FACIE CASE MAY NOT BE DISREGARDED BY THE BOARD UNLESS THE RECORD DISCLOSES A BASIS IN FACT THAT IS CONTRARY TO THE REGISTRANT'S CLAIM. THIS HOLDING IS MISINTERPRETED BY THE COURT OF APPEALS.

The Court of Appeals in its opinion states that (pp. 3-4)

> "Parker relies on *United States* v. *Dickinson*, 346 U.S. 389 (1953) to set aside the classification. The Appeal Board's decision on the basis of a registrant's file, giving 'consideration' to the recommendation of the Department of Justice, is usually the final determination of the Selective Service System. *Witmer* v. *United States*, 348 U.S. 375, 377 (1955). In that case, the court interpreted *Dickinson* to hold that there was no basis in fact for the classification because there was no evidence, 'incompatible with' Dickinson's proof, to rebut his *prima facie* case, made out by objective facts. That distinguished Witmer's case from Dickinson's, and distinguishes Parker's. In *Witmer* and here, the question cannot be determined on objective facts such as Dickinson's which involved a ministerial status. Once Dickinson's status was determined *prima facie*, the Government was required to produce a basis in fact on which the court could decide his claims were not as stated. In *Parker's* case the question is whether there is affirmative evidence produced by the Government that he has not 'painted a complete or accurate picture.' *Witmer* v. *United States*, 348 U.S. 375, 382 (1955)."

As we read the above, the Court of Appeals held that in the *Dickinson* case there was no evidence "incompat-

ible with" Dickinson's proof to rebut his *prima facie* case made out by objective facts, but that teaching doesn't apply to petitioner. Why not, because petitioner's claim "cannot be determined on objective facts such as Dickinson's which involve the ministerial statu." In petitioner's case the Court of Appeals held that that ruling does not apply because of the assumption that the government produced evidence that petitioner did not paint a complete and accurate picture. As we have shown before, there is no evidence whatsoever that the petitioner did not paint either a complete or accurate picture unless a story made of half gossip, half rumors with a dash of assumption and a twist of presumption, is evidence.

The Court of Appeals further states (p. 4) that when the record discloses any evidence of whatever nature which is incompatible with the claim of exemption "courts may not inquire further as to the correctness of the board's order. *United States* v. *Simmons*, 7 Cir., 213 F2d. 901, 904 (1954), reversed, other grounds, 348 U.S. 397 (1955)."

We respectfully submit that this court in the *Simmons* case talked about true evidence, legal evidence and not about anything that, maybe, *albeit* incorrectly, described as evidence. We believe that this court did not hold in that case, or in any other case, that it is sufficient for the government to present a letter from the Department of Justice directed to the Appeal Board and accept the statements therein as evidence even though petitioner challenged the voracity of many of those statements.

We do not believe that this court held in the *Dickinson* case that its teaching applies only to ministerial claim, for the reason that such a claim can be measured by objective evaluation. We believe that the holding of the

Dickinson case applies to petitioner here even though his subjective claim may have to be scrutinized by more exacting tools than objective yardsticks. We believe that this court will agree with us that the claim of a conscientious objector can be tested for sincerity, truthfulness, honesty and integrity. It was done so by the Local Board which believed in his sincerity. It was so tested by the Hearing Officer who saw him face to face and found his sincerity not wanting.

Petitioner submits that in accordance with the teachings of the *Dickinson*, *Sicurella* and *Simmons* cases and under the circumstances disclosed by the record here, there is no basis in fact for the Board's denial of his claim for full exemption from military service and therefore, a writ of certiorari ought to issue and the judgment ought to be reviewed.

II.

THE EMPLOYMENT OF PETITIONER AS NON-MANAGERIAL WORKER IN THE CANDY FACTORY, A SMALL PART OF WHICH CANDY IS PURCHASED BY THE GOVERNMENT IS NO BASIS IN FACT TO DENY HIS CLAIM TO EXEMPTION.

Exhibit B-18, introduced by the government, contains *inter alia* "The Hearing Officer concluded that the registrant is sincere and conscientiously opposed as a matter of religious principle to combatant participation in war and that he is sincerely and conscientiously opposed to acceptance of military jurisdiction."

Government's Exhibits B-8 and B-17 show that the Local Board which had an opportunity to see petitioner face to face questioned not for a moment that he is sincere and honest. The Board believed that he is a good member of the church. Nevertheless, the Local Board and the

Appeal Board refused to grant him the 1-O classification that he asked for, and which he maintained he was entitled to because of his religious training and belief, and because of the exemplary life that he led according to such belief.

Searching the record, we are unable to find anything therein which in any sense was incompatible with his claim for exemption.

The opinion of the Court of Appeals in the *Parker* case, applied here (page 3) clearly indicates that that Court found a basis in fact in petitioner's employment by Community Industries. That Court says:

> "The Department of Justice hearing officer on Parker's appeal to the Appeal Board found that Parker worked for Community Industries, a Harshmanite enterprise, which produced WAC uniforms, candy for army rations, valves used on naval vessels, and other items usable in war; that Parker did not consider it immoral or a violation of his Christian duty to manufacture ammunition; that Parker viewed the Harshmanite 'reluctance to manufacture munitions * * * not [as] a matter of religious belief, but merely a matter of preference;' and that Parker subscribed to the beliefs and opinions of the Harshmanites." (Read R. R. Harshman for Parker)

While the above holding of the Court of Appeals points to the only possible basis in fact, we submit, as we did in our Petition for Rehearing, that the same is studded by misstatements. One of the misstatements results from the fact that the court can not know what the Hearing Officer found because as we will show hereafter, the Trial Court refused to order the Hearing Officer's Report into the Court even though petitioner challenged that part of the Department of Justice's Recommendation

to the Appeal Board (B-18 and B-36) that referred to the Hearing Officer's Report. As the record discloses and as the summary of the case indicates the Community Industries which employed petitioner is *not a Harshmanite enterprise*, whatever that may mean, but rather it is an Illinois corporation, owned by the stockholders. There is another misstatement; since there is not one iota of evidence that Community Industries produced WAC uniforms, the only reference to that is in the Department of Justice's recommendation (B-18 and B-36). The only evidence as to any kind of manufactured goods purchased by the government from the dress division of the company is the testimony of witness Hagerman (Ap. 33), that the dress division in times past may have sold some of its products to the government. There is not an iota of evidence except the *ex parte* statement in the Department of Justice's recommendation that the company ever manufactured candy for army rations. The only evidence with reference to candy is contained in witness Hagerman's testimony to the effect that in recent years some of the candy was sold to government sources. (Ap. 35).

There is a statement in the Court of Appeals opinion above quoted to the effect that Community Industries produced "valves used on naval vessels and other items usable in war." There is *not an iota of evidence justifying that statement* unless this Court is willing to accept the *ex parte* statement of the Department of Justice (B-18 and B-36) which was challenged by the petitioner as to its veracity and factualness. The only evidence found as to "war goods" mentioned in B-36 appears to show that those "war-goods" were made out of whole cloth because the record clearly denies any manufacture of destructive items (Ap. 35-37).

The Court of Appeals opinion also held that Community Industries were manufacturing "other items usable in war." Petitioner respectfully submits that no such items were manufactured as far as the record discloses and if there was any manufacturing done of such items it was done by the Department of Justice in its *ex parte* recommendation, B-18 and B-36, and by the Court of Appeal accepting such *ex parte* statements as the gospel truth, even though petitioner categorically denied their truthfulness.

The Court of Appeals found that petitioner "did not consider it immoral or a violation of his Christian duty to manufacture ammunition." This statement is based not on the record other than B-18 and B-36, *i.e.* contradicted statements of the Department of Justice addressed to the Appeal Board. The record is to the contrary because defense witness Hagerman testified that no member in good standing would ever manufacture items that would be used solely for destructive purposes. That no member in good standing, as petitioner is, would manufacture items of war (Ap. 35). Petitioner was not permitted because of the objection of the government to answer the question whether he ever stated to the Hearing Officer or to anyone else that it is not a violation of his Christian duty to manufacture goods for military consumption. (Ap. 42-32). In his offer of proof he stated that he told to the Hearing Officer that he knows that the company that employed him for the past 8 years never manufactured any war goods, it manufactures only items for civilian consumption though some of the products may have been bought by the government.

The Court of Appeals opinion above quoted contains a sentence in quotation marks which says that petitioner considered the members of his church "reluctant to manu-

facture munitions * * * not [as] a matter of religious belief, but merely a matter of preference;", then the Court goes on to say that petitioner subscribed to the beliefs and opinions of the Harshmanites. The quoted sentence has its source in the recommendation of the Department of Justice repeatedly challenged by petitioner as to its truthfulness and it does not come from any other part of the record. The record shows that he denied ever making the statement to the Hearing Officer "It would not be considered immoral or a violation of their Christian duty to manufacture ammunition." He denied making the statement to the Hearing Officer and in fact, to anyone else that "reluctance to manufacture munitions is not a matter of religious belief, but merely a matter of preference." Petitioner in his offer of proof stated that he owes the government any service that does not involve personal participation in war. (Ap. 46).

Having stripped the above quotation from the Court of Appeals opinion of all erroneous statements, what is left there is the fact admitted by the petitioner that he, for the past 4 years was working for Community Industries, Ltd., an Illinois corporation, as a candy salesman in its candy division. He also admitted that some of the candy manufactured by his company may have been sold to the government.

The petitioner submits that his employment as a civilian doing the innocuous work of selling candy cannot be and ought not to be considered a basis in fact for the Board's denial of his *prima facie* established case for 1-O classification. It cannot be considered basis in fact even if it is admitted that some of the candy was purchased by the government.

We do not believe that this Court will consider petitioner's employment as a candy salesman a basis in fact

to deny his classification because it was said by this Court that a draftee's willingness to fight at Armageddon does not indicate his willingness to participate in war because:

> ". . . Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets. We believe the reasoning of the Government in denying petitioner's claim is so far removed from any possible congressional intent that it is erroneous as a matter of law." *Sicurella* v. *United States*, 348 U.S. 385, 75 S.Ct. 403, 406.

The government's own evidence, Exhibits B-18 and B-36, that being the *ex parte* recommendations of the Department of Justice to the Appeal Board, shows that the members of the Church of Jesus Christ as petitioner here, are "strangers in the land of Sullivan" and as such strangers and because of economic determinism they must find work which permits them to live and labor in accordance with their beliefs. The Community Industries gives them that possibility. To deprive petitioner of his *prima facie* established claim to exemption from full military service because he is so employed would be tantamount to say to him that he has to choose between not earning his livelihood or forfeiting his right to follow his conscience.

The Court of Appeals for the Seventh Circuit decided the case of *United States* v. *Wilson*, 215 F2d 443. In that case, the Court held that, they do not think,

> "The defendant's employment as a railroad telegraph operator was in any way inconsistent with his claim to exemption as a conscientious objector."

That court did not so hold because,

> "It would be wholly unrealistic to construe this (Sec. 6(j)) language to mean that a person whose civilian employment indirectly contributed to the war effort could not, therefore meet the statutory test for exemption."

That Court found it difficult to conceive,

> "of any gainful activity which, in periods of extensive mobilization and training, would not in some manner aid the common purpose. Moreover, the act expressly recognizes that one may engage in civilian work contributing to the national welfare without losing the right to be classified as a conscientious objector."

The pastor of the church wrote to petitioner's Draft Board and the writing was introduced by the government as Exhibits B-3, B-4 and B-5. The pastor's statement, we submit, sums up the problem because,

> "If it is wrong to produce anything which is helpful to the government in time of war then it is wrong to engage in farming at such a time. In fact, logic would force one at such a time to refuse to engage in any constructive effort . . ."

Petitioner submits that this Court should declare that his, and other innocuous employments, even though helpful to the government, is not basis in fact to refuse full conscientious objector classification to one who *prima facie* established that he is entitled to it.

III.

LACK OF DUE PROCESS AND FAIRNESS AT ANY STEP OF THE SELECTIVE SERVICE PROCESSING WILL CARRY OVER AND WILL TAINT THE WHOLE PROCEEDINGS.

Petitioner claimed in the Trial Court as well as before the Court of Appeals that the Local Board while admitting his sincerity and the justification of his claim for full conscientious objector classification based on his religious training and belief nevertheless illegally denied him such classification. He submitted that pursuant to Exhibits B-11 and B-29 introduced into evidence by the government he recapitulated the transaction before the Local Board as it transpired a day before. He recalled in this document which was never contradicted by any evidence that when the Board denied him 1-O classification there was an inquiry as to reasons of such denial. One of the Board members, Mr. Clancy, stated that "I don't believe there is any such thing as a real conscientious objector. I believe that any person that lives in America and makes his living in this country should be willing to fight for his country." (B-8)

Further, Board member Saxton stated:

> "That as far as he was concerned there was no such thing" as 1-O classification.
>
> "Board Chairman McNutt said that "He believed to get this classification" that is 1-O classification, petitioner would have to leave this country. (B-29)

Petitioner submitted that such reasoning by Draft Board members clearly indicates that the denial of the 1-O classification was not based either on law or on the rules of the Board. The Court of Appeals on that point found as follows: (p. 5)

"The Local Board clerk testified that the Board 'felt they were doing their best to acknowledge the registrant's religion * * *' and thus, according to Parker, showed that emotion rather than the law permeated the Local Board proceeding. The only relevant issue before us in this case is the classification of the Appeal Board in its independent, *de novo* proceeding. This proceeding superseded the Local Board's hearing because there is nothing to show that the prejudice of the Local Board, if any, corrupted the decision of the Appeal Board, *United States* v. *Van Hook*, 7 Cir., 284 F.2d 489, reversed and remanded for resentencing, 365 U.S. 609 (1961)".

Petitioner knows that the Appeal Board classification superseded the Local Board's hearing but he respectfully disagrees with the Court of Appeals that "there is nothing to show that the prejudice of the Local Board, if any, corrupted the decision of the Appeal Board." To the contrary, he submits they denied his claim to 1-O classification on some extraordinary non-legal grounds. The Appeal Board did not see him, did not talk to him, nevertheless upon the review of the files left him in the same classification as given to him by the Local Board. Petitioner presents as his presumption that the clearly expressed bias and prejudice of the Local Board carried over to, and was adopted by the Appeal Board and the hearing before the latter Board was not *de novo* but was a sham and nothing more.

Further the petitioner says that there is another presumption and that is that the recommendation of the Department of Justice containing a great many untruthful statements as he and his witnesses offered to testify, did influence the Appeal Board to his great prejudice. He doesn't believe that this court will permit the judgment to stand when the same is bottomed not on evidence

but rather on guess, since there is no denial of bias and prejudice somewhere along the way. It is but speculation and guess work that the bias "may not" prejudice him at all. To permit the judgment to stand would be equivalent to guess petitioner into the penitentiary.

IV.

BASIS IN FACT IS SOMETHING PALPABLE AND MUST BE TENABLE AND CONJECTURES AND PRESUMPTIONS ARE NOT SUFFICIENT.

The Court of Appeals in its opinion (p. 4) wrote that:

> "Parker also relies upon *Batterton* v. *United States*, 8 Cir., 260 F.2d 233 (1958), which is not in his favor on the facts before us. And each case must 'of necessity be based on the particular beliefs of the individual.' *Sicurella* v. *United States*, 348 U.S. 385, 390 (1955). The court there said the record 'does not even by indirection,' deny Sicurella's sincere religious beliefs. Parker argues the record here as to him is like that record as to Sicurella. But Sicurella's sincerity was admitted and the court said 'we are therefore relieved of the task of searching the record for basis in fact to support a finding of insincerity.' p. 388." (read R. R. Harshman for Parker).

At this point the statement stops though one may presume that the juxtaposition intended to indicate that while Sicurella's sincerity was admitted, Harshman's was not. As we pointed out heretofore, this is a total misreading of the record because his sincerity was admitted by the Local Board and by the Hearing Officer, (that is in those instances where he had a personal appearance) and this finding of sincerity was not challenged at any other instance. We believe that petitioner's sincere religious beliefs were not denied "not even by indirection" just as in the *Sicurella* case. However, the Court of Appeals

goes on to say that "The Department of Justice recommendation disclosed Parker's (read Harshman's) view that it would not be considered immoral or a violation of their Christian duty to manufacture ammunition . . .' This fact would suffice to rebut Parker's (read Harshman's) *prima facie* showing." The statement that in his view he, as a Christian, could engage in the manufacture of ammunition, which statement petitioner submits is false, is cited by the Court of Appeals twice. (pp. 3-4). The Petitioner submits that the Court of Appeals accepts the statement contained in the Department of Justice's recommendation as a *fact* even though petitioner and his witnesses repeatedly challenged the truthfulness of these statements. He repeatedly denied the so-called facts to be facts and did show as the record discloses that they are the result of someone's dreams if not of his nightmares.

Petitioner submits that the Court of Appeals "instead of chasing those rabbits"* which it designated as facts, should have inquired why the true facts were not permitted by the Trial Court to be disclosed when the petitioner challenged the Department of Justice's recommendation and in support of his challenge he asked for an order to produce the Hearing Officer's report (to which matter we shall return later). Here, however, petitioner submits that it was error and prejudicial at that, for the Trial Court to exclude the testimony of witness Hagerman and the offer of proof made on his behalf and so was it prejudicial error to exclude petitioner's own testimony and his offer of proof because such proffered testimony denied the allegations to be facts, notwithstanding the Court of Appeals calling it fact. Petitioner also submits that prejudice resulted from the Trial Court's

* As was said by Justice Clark in his concurring opinion, **Baker v. Carr**, 82 S.Ct. 691 (1962) p. 732.

precluding him from presenting testimony on this court is shown because thereby the Court of Appeals was misled to accept non-facts as facts (Ap. 35, 43, 44, 45-47). Because of the unsubstantial and unsubstantiated evidence of the government attempting to overcome petitioner's *prima facie* case this court ought to grant a certiorari and ought to review the case.

V.

THE SUBMISSION OF THE SELECTIVE SERVICE FILE TO THE JURY WAS PREJUDICIAL TO PETITIONER AND SO WAS THE TRIAL COURT'S RULING PRECLUDING HIM FROM QUESTIONING SOME OF THE DOCUMENTS IN THE FILE.

The Court of Appeals in its opinion (p. 6) held that the Trial Court,

> ". . . erred in permitting the S.S.S. file to go to the jury, for, as the court in *Cox* said, '. . . nothing in the file is pertinent to any issue proper for jury consideration.' But we see no prejudice from this fact since the jury had already heard oral testimony of the substance of its contents."

Petitioner is hard put and he finds it next to impossible to follow the Court of Appeals' reasoning that while it was error to have the Selective Service file sent to the jury, that there was no prejudice "since the jury had already heard oral testimony of the substance of its contents."

Petitioner complained before and does now exactly on this point since he knows that the jury heard oral testimony as to the file; the jury was permitted to "peruse" the whole of the file while he was not permitted to question any of the documents therein (Ap. 41).

Petitioner objected and now objects because the jury heard orally about the Department of Justice recommendation (Exhibits B-18 and B-36) but he was not permitted to show that this recommendation contained many misstatements, falsehoods, particularly with reference to what petitioner said to the Hearing Officer and what the Hearing Officer said to him (Ap. 42-43). The Petitioner objected and does now because the government insisted upon presenting the Selective Service file before the jury and then objected and the Court sustained the objection to his attempts to go into the content of the selfsame file. Petitioner believes that he had the right and that this court will uphold his right to explain what was in that file and what part thereof is contradicted by him particularly after the Trial Court over the objection of petitioner admitted the Selective Service file as a whole into evidence (Ap. 11).

In *Cox* v. *United States*, 332 U.S. 442 (1947), 457, 68 S.Ct. 115, in footnote 4, this court refers to *Smith* v. *United States*, (4 Cir.) 157 F2d. 176, wherein the Court of Appeals of that circuit "held that the submission of the issue of classification to the jury constituted reversible error." Petitioner admits that the Trial Court attempted by its instructions to make it clear to the jury that the classification is not before it, however, the jury was thus put before a dilemma since it had the file before it but it was told to look at it only with one eye and thus a situation was created which undoubtedly prejudiced him. The prejudice was the greater because he was precluded by the Trial Court from questioning some of the documents in his file.

Because there is a conflict between the holdings of, in this case, of the 7th and that of the *Smith* case in the 4th circuit, petitioner respectfully submits that this court

ought grant the petition for a writ and to review the case and thus decide which of the two antagonistic positions is the law.

VI.

THE REFUSAL OF THE TRIAL COURT TO ORDER THE PRODUCTION OF THE HEARING OFFICER'S REPORT WHEN THE TRUTHFULNESS OF THE REFERENCE THERETO WAS CHALLENGED BY PETITIONER WAS HIGHLY PREJUDICIAL TO HIM.

The Court of Appeals disposes of petitioner's challenge to the Trial Court ruling twice refusing an order to produce the Hearing Officer's report when it states (p. 5)

> "There was no error in the District Court's ruling which precluded production of the Department of Justice hearing officer's report; and no error in denying the motion for acquittal on this ground. Neither the Act nor the regulation, since 1952, requires the report placed in the file. *Gonzales* v. *United States*, 364 U.S. 59 (1960).

Petitioner has no quarrel with the statement that the regulations, at least since 1952, do not require the Hearing Officer's report be made part of the file, but he quarrels with the holding that the decision in this court in *Gonzales* v. *United States*, 364 U.S. 59, 75 S.Ct. 409, means that under the circumstances of this case such an order to produce was not required. To the contrary, he says that he was prejudiced by the denial of his motion because as this court said in the *Gonzales* case

> ". . . petitioner has failed to show any particular need for the report and notes. While there are now allegations of the withholding of 'favorable evidence developed at the hearing' and a denial of a 'full and fair hearing,' no such claim was made by petitioner

at any stage of the administrative process. Moreover, his testimony at trial never developed any such facts. *In the light of these circumstances*, as well as the fact that the issue at trial in this respect centered entirely on the Department's recommendation, which petitioner repudiated but which both the appeal board and the courts below found supported by the record, we find no relevancy in the hearing officer's report and notes." (page 557) (emphasis added)

In our instant case, all of the missing factors in the *Gonzales* case are present. Richard Harshman did challenge the fairness of his hearing throughout his administrative process and particularly challenged in government's Exhibit B-39 the correctness of the hearing officer's report found in government's Exhibit B-36 and continued his argument in the trial court. Richard Harshman during his testimony, continued to state that the remarks of the hearing officer in his report were not factual and denied the quoted contents of the hearing officer's report most pointedly, claiming that the hearing officer's report would contain evidence favorable to him. In the instant case, we believe that the hearing officer's report was the very basis for the Department of Justice's recommendation and if such was repudiated, certainly this is a direct issue and the relevancy of the hearing officer's notes and his original report to the Department of Justice is very clear. The defendant submits that under the circumstances of this case and to obtain a full and fair hearing, it was necessarily required that the report of the hearing officer be produced.

Petitioner submits that the Appeal Board rejected his claim on an incomplete presentation because it had before it the recommendation of the Department of Justice (B-18 and B-36) which referred to a Hearing Officer's

report and pertained to "some part of that report." This alleged quotation was challenged by the petitioner both before the Appeal Board and before the Trial Court. Neither of these authorities had the Hearing Officer's report before it and of course, neither of them could determine whether the challenge of the petitioner was justified. By force there was a choice to be made and decide whether the Department of Justice recommendation was non-factual or whether the petitioner was not honest in his challenge of the Department of Justice allegations. From the fact that both the Appeal Board and the Trial Court ruled against petitioner one must presume that the sincerity of his challenge to Exhibits B-18 and B-36 was considered negated which undoubtedly was carried forward and his sincerity as a whole was thereby questioned. The prejudice so resulting was great and irremediable. There was error in denying his motion to order the production of the hearing officer's report and in the light of the circumstances of this case, the decisions of the lower courts are in direct conflict with the decision of this court in the case of *Gonzales* v. *United States*, 364 U.S. 59, 80 S.Ct. 1554.

In view of this prejudicial error this court ought to grant a certiorari and ought to review the case.

CONCLUSION.

"Fundamental too, in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after a fair trial. The hearing, moreover, must be a real one, not a sham or pretense." *Palko* v. *State of Conn.*, 302 U.S. 319, 58 S. Ct. 149.

Petitioner submits that he was condemned without a fair trial; that the hearings that he received throughout the Selective Service proceedings were not real but solely pretenses.

The Court of Appeals for the Seventh Circuit holds that:

> "The briefs, appendices, and records in the *Parker* and *Harshman* appeals are substantially identical. The claims of error at the trial, the contentions on appeal, the cases in support of the contentions, and the arguments are virtually the same in both appeals. The indictments, except for names of the defendants, are identical."

and because of that it held that that court's decision in *United States* v. *Parker*, (No. 13585) controls the decision in this case (No. 13586). Petitioner does not argue when that court states that his case is substantially identical with that of Parker whatever the term "substantial" may mean. However, he wants to point out and notwithstanding of the Court of Appeals holding the two cases identical, the Trial Court found it proper to sentence this petitioner to imprisonment for a term of two years, six months and to fine him with the sum of fifteen hundred dollars while in the *Parker* case, that petitioner was given a prison term six months shorter and a fine of five hundred dollars less than was given to this petitioner. One wonders for the reason of such additional severity of the Trial Court's judgment. If one looks upon the record, one must conclude that this additional penalty may have been the result of this petitioner's statement to the Trial Court as it appears in Appendix 70, 71, and as it was referred to hereinabove. One wonders whether the Trial Court gave him the extra punishment because he was willing to accept judgment of the Trial

Court as the Lord's Will. One wonders whether he was so singled out because he stated that he can serve his Maker in jail or at work. The fact, however, is, that in two cases which the Court of Appeals for the Seventh Circuit found to be "substantially identical" petitioner was given a more severe sentence, thus the substantial identity of the two cases was done away with.

For the reasons hereinabove set forth, he submits that the writ of certiorari ought to be granted.

Respectfully submitted,

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Chicago, Illinois
Oct. 4, 1962.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13586 SEPTEMBER TERM, 1961 | APRIL SESSION, 1962

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. RICHARD R. HARSHMAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

August 20, 1962

Before SCHNACKENBERG, KNOCH, and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is an appeal from a judgment upon a verdict of a jury, convicting defendant of violation of § 12 of the Universal Military Training and Service Act[1] by refusal to submit to induction into military service. He was sentenced to the custody of the Attorney General for two and one-half years, and was fined $1,500.00.

A companion appeal, No. 13585, *United States* v. *Malcolm Lebert Parker*, is being filed simultaneously herewith.

Harshman, like Parker, was classified as 1-A-O because of his beliefs founded on the Harshmanite[2] religion.

[1] 50 U.S.C.A. App. § 462.

[2] The Church of Jesus Christ, Sullivan, Illinois.

The briefs, appendices, and records in the *Parker* and *Harshman* appeals are substantially identical. The claims of error at the trial, the contentions on appeal, the cases in support of the contentions, and the arguments are virtually the same in both appeals. The indictments, except for names of the defendants, are identical.

For these reasons, our decision in *United States* v. *Parker* controls our decision here.

For the reasons given in *United States* v. *Malcolm Lebert Parker*, No. 13585, the judgment in this cause is AFFIRMED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Monday, August 20, 1962

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win Win G. Knoch, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

United States of America,
Plaintiff-Appellee,
No. 13586 vs.
Richard R. Harshman,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Friday, September 14, 1962

Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

United States of America, Plaintiff-Appellee, No. 13586 vs. Richard R. Harshman, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13585 SEPTEMBER TERM, 1961 APRIL SESSION, 1962

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MALCOLM LEBERT PARKER, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

August 20, 1962

Before SCHNACKENBERG, KNOCH, and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is an appeal from the judgment on verdict of a jury, convicting defendant of violation of § 12 of the Universal Military Training and Service Act[1] by his refusal to submit to induction into military service. He was sentenced to the custody of the Attorney General for two years, and was fined $1,000.00.

The defendant Parker, a member of the Harshmanite religious sect,[2] registered for the draft before Local Board 177 in Sullivan, Illinois, May 9, 1955. He was classified 1-A-O[3] and subsequently that classification was confirmed by the Board after a hearing upon Parker's objection to the classification on the ground that his "religious belief."

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[1] 50 U.S.C.A. App. § 462.

[2] The Church of Jesus Christ, Sullivan, Illinois.

[3] This classification covers those who are opposed to combatant service but inductible in a noncombatant capacity.

On Parker's appeal to the Illinois State Appeal Board, the Department of Justice, by virtue of § 6(j)[1] of the Act, made an inquiry into the case, and granted a hearing upon his claim to an exemption as a conscientious objector under classification 1-O.[2] He and four witnesses appeared before the hearing officer who found Parker had not sustained his claim and recommended the 1-A-O classification. The Department of Justice concluded that Parker had established his conscientious objection to combatant military service but not with respect to non-combatant service. The Department recommended to the Appeal Board that he be classified 1-A-O.

Parker submitted his reasons in writing to the Appeal Board for not accepting the classification. The Board by unanimous vote again classified him 1-A-O. He was then examined physically and found acceptable for service. The Local Board thereafter "reopened and considered anew" the classification and retained him in 1-A-O. No further steps were taken by Parker for another personal appearance or appeal. He was ordered by the Board to report for induction. He reported, but refused to submit to induction. His indictment, trial, and conviction followed.

We see no merit in Parker's contention that there was no basis in fact to support the court's decision not to interfere with his classification.

The Act makes no provision for the customary scope of judicial review; courts are not to weigh the evidence to determine whether the classification was justified; if in conformity with regulations, the Board decisions are final, even if erroneous; and the question of jurisdiction is reached only if there is no basis in fact. *Estep* v. *United States*, 327 U. S. 114 (1946).

The District Court's function was to ascertain "whether there was a basis in fact for the classification," *United*

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[1] U.S.C.A. App. § 456(j) (1961 Supp.).

[2] This classification covers those individuals conscientiously opposed to participation in the armed forces in either a combatant or noncombatant capacity.

States v. *Van Hook*, 7 Cir., 284 F. 2d 489, 494, reversed and remanded for resentencing, 365 U. S. 609 (1961). The court was confined to a review of Parker's file in deciding whether a basis in fact existed. *United States* v. *Mohammed*, 7 Cir., 288 F. 2d 236, 238, cert. denied, 368 U. S. 820 (1961). It was not to look for substantial evidence to support the determination of the Local or Appeal Board. *Witmer* v. *United States*, 348 U. S. 375, 381 (1955).

In his classification questionnaire Parker claimed a status of conscientious objector to participation in war in any form. He requested, filled out and returned to the Local Board the special S.S.S.* form reiterating his claim "by reason of my religious training and belief;" stating his belief in a Supreme Being; his membership in the Church of Jesus Christ in which he was raised and whose teachings he accepted; and in a typewritten statement expanded on his belief and its basis in the Bible.

The Department of Justice hearing officer on Parker's appeal to the Appeal Board found that Parker worked for Community Industries, a Harshmanite enterprise, which produced WAC uniforms, candy for army rations, valves used on naval vessels, and other items usable in war; that Parker did not consider it immoral or in violation of his Christian duty to manufacture ammunition; that Parker viewed the Harshmanite "reluctance to manufacture munitions * * * not [as] a matter of religious belief, but merely a matter of preference;" and that Parker subscribed to the beliefs and opinions of the Harshmanites.

Because we have concluded the District Court did not err in deciding there was a basis in fact for the classification, it follows that the induction order was not void. And it also follows that the District Court did not err in denying Parker's motion for acquittal at the close of the Government's case, for want of a basis in fact.

Parker relies on *United States* v. *Dickinson*, 346 U. S. 389 (1953) to set aside the classification. The Appeal Board's

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*The Selective Service System, herein referred to as the S.S.S.

decision on the basis of a registrant's file, giving "consideration" to the recommendation of the Department of Justice, is usually the final determination of the Selective Service System. *Witmer* v. *United States*, 348 U. S. 375, 377 (1955). In that case, the court interpreted *Dickinson* to hold that there was no basis in fact for the classification because there was no evidence, "incompatible with" Dickinson's proof, to rebut his prima facie case, made out by objective facts. That distinguished Witmer's case from Dickinson's, and distinguishes Parker's. In *Witmer* and here, the question cannot be determined on objective facts such as Dickinson's, which involved a ministerial status. Once Dickinson's status was determined prima facie, the Government was required to produce a basis in fact on which the court could decide his claims were not as stated. In Parker's case the question is whether there is affirmative evidence produced by the Government that he has not "painted a complete or accurate picture." *Witmer* v. *United States*, 348 U. S. 375, 382 (1955). "When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption" courts may not inquire further as to the correctness of the board's order. *United States* v. *Simmons*, 7 Cir., 213 F. 2d 901, 904 (1954), revered, other grounds, 348 U. S. 397 (1955).

Parker also relies upon *Batterton* v. *United States*, 8 Cir., 260 F. 2d 233 (1958), which is not in his favor on the facts before us. And each case must "of necessity be based on the particular beliefs of the individual." *Sicurella* v. *United States*, 348 U. S. 385, 390 (1955). The court there said the record "does not even by indirection," deny Sicurella's sincere religious beliefs. Parker argues the record here as to him is like that record as to Sicurella. But Sicurella's sincerity was admitted and the court said "we are therefore relieved of the task of searching the record for basis in fact to support a finding of insincerity." p. 388.

We see no inconsistency in the Department of Justice and the Board recognizing Parker's sincerity of religious belief and the classification based on the admitted fact of

his willingness to participate in the production of war goods. The Department of Justice recommendation discloses Parker's view that "it would not be considered immoral or a violation of their Christian duty to manufacture ammunitions * * *." This fact would suffice to rebut Parker's prima facie showing. We do not read the language of *Witmer* v. *United States*, 348 U. S. 375 (1955) that "there must be some inference of insincerity or bad faith" to mean that there must be evidence that registrant is a hypocrite or liar. The Board was not required to classify Parker 1-O merely because he stated he was opposed "to participation in war in any form." His testimony taken as true disclosed that he did participate in aiding the war effort. There is a distinction between a conviction based on a sincere religious belief and a conviction based on an erroneous inference about what participating in a war means. In *United States* v. *Wilson*, 7 Cir., 215 F. 2d 443 (1954), the nature of Wilson's employment was not incompatible with his prima facie proof of 1-O classification and the file contained no affirmative evidence to support the National Board's 1-A classification. That case does not aid Parker.

Parker's file does not show that he was given notice of the time and place of hearing by the Department of Justice examiner or sent a copy of the Department recommendation to the Appeal Board, to which he was entitled to file a written reply. He contends there was not full compliance therefore with the Selective Service regulations. The Department of Justice letter to the Board discloses a hearing was had and the file contains Parker's letter or "reply" to the Appeal Board. There is no substance to this contention. And we are not to determine the truth or falsity of the evidentiary basis of the Department of Justice recommendation unless the irregularities affected the Appeal Board's review. *United States* v. *Moore*, 217 F. 2d 428, reversed on other grounds, 348 U. S. 966 (1955).

The Local Board clerk testified that the Board "felt they were doing their best to acknowledge the registrant's religion * * *" and thus, according to Parker, showed that

emotion rather than the law permeated the Local Board proceeding. The only relevant issue before us in this case is the classification of the Appeal Board in its independent, de novo proceeding. This proceeding superseded the Local Board's hearing because there is nothing to show that the prejudice of the Local Board, if any, corrupted the decision of the Appeal Board. *United States* v. *Van Hook*, 7 Cir., 284 F. 2d 489, reversed and remanded for resentencing, 365 U. S. 609 (1961). Nor is there merit in the contention that the recommendation of the Department of Justice stating that the courts consistently upheld 1-A-O classification where there was a willingness to do work supporting the war effort unduly influenced the Appeal Board and denied him due process. Since there is affirmative evidence to support the classification, we presume in the absence of further showing that the Appeal Board did not fail in its duty to respect Parker's rights.

There was no error in the District Court's ruling which precluded production of the Department of Justice hearing officer's report; and no error in denying the motion for acquittal on this ground. Neither the Act nor the regulation, since 1952, requires the report placed in the file, *Gonzales* v. *United States*, 364 U. S. 59 (1960).

The only relevant questions at the trial were whether there was a basis in fact for the classification; and if so, whether Parker refused to submit to induction. The first question was for the judge, not the jury, upon the S.S.S. file. *Cox* v. *United States*, 332 U. S. 442 (1947), rehearing denied, 333 U. S. 830 (1948). The trial court properly refused to permit cross-examination of witnesses before the jury, on the S.S.S. file, and properly sustained objections in testimony and rejected offer of proof on testimony bearing on the classification by the Local Board.

The only question for the jury in this case was whether Parker refused to submit. The court erred in permitting the S.S.S. file to go to the jury, for, as the court in *Cox* said, "* * * nothing in the file is pertinent to any issue proper for jury consideration." But we see no prejudice

from this fact since the jury had already heard oral testimony of the substance of its contents. The court properly precluded testimony that Parker's intention in refusing to "step forward" was merely to test the Draft Board's right to order his induction.

The court refused to give Parker's proferred instruction setting forth § 6(j) of the Act. This was not error. The question of exemption from service was not for the jury. Nor was there error in the refusal to give an instruction on bias and prejudice, because there was no evidence from which an inference could be drawn that bias or prejudice influenced the Appeal Board's classification. We have read the other refused instructions, and arguments for them in the transcript, and see no error in the rulings. The court should not have instructed the jury on its "independent review of the evidence" nor on credibility of witnesses in this case. But there errors were not prejudicial.

The judgment is AFFIRMED.

APPENDIX B.

50 USC. 462; 62 Stat. 622—OFFENSES AND PENALTIES.

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title (sections 451-454 and 455-471 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title (said sections), rules, regulations, or directions who shall knowingly make, or be a party to the making of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title (said sections), or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title (said sections), or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title (said sections), or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title (said sections), or rules, regulations, or directions made pursuant to this title (said sections), or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this (said sections) or the rules or regulations made pursuant thereto, or who conspires to commit any one or

more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title (said sections) unless such person has been actually inducted for the training and service prescribed under this title (said sections) or unless he is subject to trial by court martial under laws in force prior to the enactment of this title (June 24, 1948). Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall, upon request of the Attorney General, be advanced on the docket for immediate hearing. . . . . June 24, 1948, c. 625, Title 1, p. 12, 62 Stat. 622.

PART 1622—CLASSIFICATION RULES AND PRINCIPLES

General Principles

1622.1 *General Principles of Classification.*—(a) The Universal Military Training and Service Act, as amended, provides that every male citizen of the United States, every male alien admitted to the United States for permanent residence, and every male alien who has remained in the United States in a status other than that of permanent resident for a period exceeding one year, who is between the ages of 18 years and 6 months and 26 years, shall be liable for training and service in the Armed Forces of the United States, and that persons who on June 19, 1951, were or thereafter are, deferred under the provisions of clause (A) or clause (C) of section 6(c)(2) of such Act shall remain liable for training and service until they attain the age of 28, and that persons who on June 19, 1951, were, or thereafter are, deferred under any other provision of section 6 of such Act shall remain liable for training and service until they

attain the age of 35. Certain exemptions and deferments are specifically provided; others are authorized to be provided by regulations promulgated by the President.

(b) Classification is the key to selection and it must be accomplished in the spirit of the Universal Military Training and Service Act, as amended, in which the Congress has declared "that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form No. 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious or other organization. Each such registrant shall receive equal justice.

1622.2 *Classes.*—Each registrant shall be classified in one of the following classes:

CLASS I

Class I-A: Available for military service.

Class I-A-O: Conscientious objector available for noncombatant military service only.

Class I-C: Member of the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service.

Class I-D: Member of reserve component or student taking military training.

Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.

1622.11 *Class I-A-O: Conscientious Objector Available for Noncombatant Military Service Only.*—(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

1622.14 *Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form

and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

1622.16 *Class I-W: Conscientious Objector Performing Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*—(a) In Class I-W shall be placed any registrant who has entered upon and is performing civilian work contributing to the maintenance of the national health, safety, or interest, in accordance with the order of the local board.

(b) In Class I-W shall be placed any registrant who subsequent to being ordered by the local board to perform civilian work contributing to the maintenance of the national health, safety, or interest has been released from such work by the local board after satisfactorily performing the work for a period of twenty-four consecutive months or has been sooner released from such work by the Director of Selective Service under the provisions of section 1660.24 of this chapter. Each such registrant shall be identified on all records by following his classification with the abbreviation "Rel." and, upon attaining an age beyond the maximum age of liability for military service under the provisions of the selective service law, all such registrants shall be reclassified in Class V-A.

PROCEDURE FOLLOWED BY APPEAL BOARD

1626.25 *Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall tentatively determine whether or not the registrant is eligible for classification in a class lower than Class I-O or in Class I-O. If the appeal board finds that the registrant is eligible for classification in Class I-O or in a lower class, it shall place him in the appropriate class.

(b) If the appeal board tentatively determines that the registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(c) No registrant's file shall be forwarded to the United States Attorney by any appeal board unless the record on the Classification Questionnaire (SSS Form No. 100) shows and the letter of transmittal states that the appeal board reviewed the file and tentatively determined that the registrant should not be classified in Class I-O or in a lower class. Any file forwarded to the United States Attorney without the information required by this paragraph shall be returned to the appeal board.

(d) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraphs (b) and (c) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall

be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(e) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant, together with a letter advising the registrant that, within thirty days after the date of such mailing, he may file with the appeal board a written reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 515

RICHARD R. HARSHMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–2) is not yet reported. An opinion of the court of appeals in the related *Parker* case, to which the instant opinion refers (Pet. App. 5–11), has also not yet been reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1962 (Pet. App. 1, 3; R. 79, 81). A petition for rehearing was denied on September 14,

[1] A petition for a writ of certiorari has been filed in the *Parker* case, No. 516, this Term. Since the major opinion of the court of appeals was written in that case, we have discussed the common issues there, dealing here only with the matters that are peculiarly applicable to this case.

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1962 (R. 82; Pet. App. 4). The petition for a writ of certiorari was filed on October 15, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a basis in fact for petitioner's classification in selective service class 1–A–0 (noncombatant service).

2. Whether various rulings by the trial judge were proper.

STATEMENT

An indictment returned in the United States District Court for the Northern District of Illinois charged that the petitioner, on November 19, 1958, willfully refused to submit to induction into the armed forces of the United States, in violation of 50 U.S.C. App. 462 (R. 2–3). After a jury trial in September 1961, petitioner was convicted and sentenced to imprisonment for thirty months and fined $1,500 (R. 4; 67, 71, 72–73). The conviction was affirmed on appeal (R. 79–80, 81).

The pertinent facts may be summarized as follows:

1. Petitioner is a member of the Harshmanite Church of Sullivan, Illinois, having become a member of that church in 1949 or 1950 when he was about 14 or 15 years of age (G. Ex. B–8).[2] In 1953, petitioner registered for the draft with Local Board No. 177 in Sullivan, Illinois. He subsequently filed a special

[2] We have lodged with the Clerk of this Court the Selective Service File of the petitioner, which was an exhibit at the trial. This will be referred to as "G. Ex. B." and the appropriate document number therein will be referred to by number.

form for conscientious objectors, together with a summary of the history and the tenets of the Harshmanite Church (R. 40–41; G. Exs. B–2, B–4; see G. Ex. B–3). Petitioner indicated that from about June 1952, he had been employed by Community Industries, a business enterprise established by the Harshmanite Church, the chief function of which is to provide employment for members of that Church, and that he was then working as an assembler of piece goods in the dress division of the factory (G. Exs. B–1, B–2). An exhibit to a letter by the pastor of the Harshmanite Church to the local board stated that the Harshmanites "are in fact willing to produce anything needed by the government when it is engaged in carrying on war. We do not feel that doing so makes us responsible for war or the waging of war" (G. Ex. B–4). In September 1953, the local board classified the petitioner 1–A–O, *i.e.*, eligible for non-combatant military service (R. 41; G. Exs. B, B–1). After a personal appearance before the local board, petitioner was again classified 1–A–O (R. 41; G. Exs. B, B–1, B–6, B–8), and, on appeal, the Illinois Appeal Board in August 1954, also classified him 1–A–O (G. Exs. B, B–12).

In 1955, the local board reopened petitioner's classification and reclassified him 1–A–O (G. Ex. B–1). After the petitioner had made a personal appearance before the local board in support of his claim that he should have been classified 1–O (exempt from non-combatant and combatant military training and service), the board again classified him 1–A–O (G. Exs. B–1, B–20, B–26, B–27, B–34; see G. Ex. B–22).

Petitioner then appealed his classification to the Illinois Selective Service Appeal Board.

Pursuant to section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456(j), the Department of Justice investigated petitioner's case for the purpose of making a recommendation to the State Appeal Board. A hearing was held in October 1956, at which the petitioner, the pastor of the Harshmanite Church in Sullivan, and the Treasurer of Community Industries were present. In November 1956, the Department recommended that petitioner be classified 1–A–O since he was working in an industry which was engaged in the manufacture of defense products under government contract. The recommendation recited that the petitioner had worked in the garment division of Community Industries at a time when the company held government contracts to make WAC uniforms, and that the petitioner was presently employed in the candy division of that factory (G. Ex. B–36). The recommendation also recited (G. Ex. B–36):

> The registrant stated that it is not a violation of their Christian duty to manufacture goods for military consumption but that they do not accept the responsibility for actions of persons who use such products. He said, however, that by becoming members of the armed forces they would become responsible for such actions. The registrant verified that the beliefs and opinions of the Harshmanites in general are also his own personal beliefs and opinions.

The Department expressed the view that petitioner had failed to sustain his claim with regard to non-combatant military service.

In a letter to the Appeal Board in December 1956, petitioner claimed that he was entitled to a 1-0 classification on the basis of his religious beliefs, and that the local board had not given "unbiased consideration" to his claim inasmuch as one member of the board had said that there was "no such thing" as a 1-0 classification and the board chairman had indicated that petitioner would have to leave the country in order to obtain a 1-0 classification (G. Ex. B-39). The letter stated (G. Ex. B-39):

> I cannot see how my distinction between participation and non-participation in war can be called untenable. As a civilian I am a free man. As a non-combatant member of the armed forces I am in the Army. It's just that plain. * * *

On May 10, 1957, the Appeal Board classified the petitioner 1-A-0 (G. Exs. B-1, B-34, B-40; see R. 49). The opinion recited (G. Ex. B-40):

> This Appeal Board has noted the memoranda of the local board's actions in determining the classification of this registrant and the Appeal Board does not concur with the conclusions of the local board as stated in such memoranda. This Appeal Board is accordingly ignoring those conclusions of the local board. We note, however, that the registrant and others were allowed complete freedom by the local board and by the Hearing Officer of the Department of Justice to place in the registrant's cover sheet any and all information which the registrant

wished to file in support of his claim of conscientious objection.

We have considered the entire Selective Service file of this registrant as explained above. We have also considered the recommendation of the Department of Justice but are not bound by it. We, the Appeal Board have reached the independent conclusion that this registrant, Mr. Richard R. Harshman, is conscientiously opposed to combat training and service as defined in the law. However, we find that he does not actually conscientiously object to noncombatant service as the law defines it. His classification is therefore determined by this Appeal Board to be 1–A–0.

The local board subsequently ordered the petitioner to report for induction into the armed forces on November 19, 1958 (R. 49; G. Ex. B–60). Petitioner reported to the induction center in Chicago, Illinois, but refused to submit to induction on the grounds that his religious beliefs would not permit him to do so (R. 18–19, 22, 49–50; G. Exs. B–1, B–63; see R. 47–48).

2. At the trial, petitioner's Selective Service file was introduced into evidence, and counsel for the petitioner read related documents in that file to the jury (R. 13–14, 42). The court refused to order the government to produce a copy of the report of the Departmental hearing officer (Brittingham), which was not in petitioner's Selective Service file, and refused to allow the petitioner to offer proof to contradict statements made in the Departmental recommendation to the Appeal Board or to show that Community Industries never manufactured "war goods" (R. 34–35, 43–47, 50–51).

At the conclusion of the trial, petitioner moved for judgment of acquittal on the ground that the testimony failed to show that there was a basis in fact for his 1–A–O classification or for the board's denial of his claim to 1–O classification, and that the Departmental recommendation was based upon untruthful "facts", prejudice, and "possible suspicion" (R. 52). The court denied the motion, holding that there was a basis in fact for petitioner's classification (R. 52).

ARGUMENT

1. As in the *Parker* case (No. 516), where the issues are more fully discussed (see note 1, *supra*), the trial judge properly applied the standards laid down by this Court, and found that there was basis in fact for concluding that he was not actually conscientiously opposed to noncombatant service. Before the Departmental hearing officer, petitioner stated that "it [was] not a violation of their Christian duty to manufacture goods for military consumption but that they do not accept the responsibility for actions of persons who use such products" (see G. Ex. B–36). The Departmental recommendation recited that the petitioner had been employed by Community Industries since July 1951; that he presently works in the Commissary Department of Community Industries; and that that business "held contract[s] to make WAC uniforms" at a time when the petitioner worked in the garment division (G. Ex. B–36). Petitioner did not challenge these admissions at any time during the remainder of the administrative proceedings. Indeed, in his letter to the Appeal Board of December 1956, after he had received a copy of the

Departmental recommendation, he said that he could not understand how his "distinction between participation and non-participation in war [could be] called untenable" (G. Ex. B–39). This information, which appeared in petitioner's Selective Service file, constituted a sufficient basis for his classification.

2. As discussed in the government's brief in No. 516, the trial court properly refused to allow the petitioner to introduce evidence bearing upon his classification or to challenge the Departmental recommendation to the Appeal Board (see Pet. 29–30). Moreover, this record shows, even more clearly than in No. 516, that the alleged statements by board members that they did not believe in the 1–O classification have no bearing on this case. The Appeal Board made clear that it was ignoring the conclusions reached by the local board (G. Ex. B–40). It recited that it had reached the "independent conclusion" that the petitioner did not conscientiously object to noncombatant service and that he was accordingly classified 1–A–O. The *de novo* appeal procedure would have little utility if errors before a local board, which the appeal board recognized and avoided, were deemed to infect the appellate classification.

The contention (Pet. 27–28) that the proceedings before the Appeal Board were a "sham" is without support in the record. Petitioner was afforded full opportunity to present evidence from his Selective Service file. The Appeal Board noted that the petitioner and others were allowed complete freedom by the local board and by the hearing officer of the Department of Justice to place in the cover sheet

any and all information which he wished to file in support of his claim of conscientious objection. It was only after full consideration of his file, together with the Departmental recommendation, that the Appeal Board placed petitioner in class 1-A-O (G. Ex. B-40).

The other claims of procedural error are discussed in the government's brief in No. 516. It should be noted, however, that in this case, although petitioner's Selective Service file was introduced into evidence and counsel for the petitioner read to the jury seven documents from that file (R-38-39, 42), there is nothing in the record to indicate whether the court submitted petitioner's Selective Service file to the jury for consideration (See R. 67). Assuming that the exhibit did go to the jury, petitioner could not, for the reasons discussed in No. 516, have been prejudiced thereby.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1962.

U. S. GOVERNMENT PRINTING OFFICE: 1962

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JOHN F. DAVIS, CLERK

No. 515

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962

RICHARD R. HARSHMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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Selective Service Regulation 1622.14 ..... 4a
Selective Service Regulation 1622.16 ..... 5a
Selective Service Regulation 1622.26 ..... 6a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1962.

No. 515

RICHARD R. HARSHMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF OF PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is printed on pp. 66, 67 of the Transcript of Record (R 66, 67), and is reported at 307 F. 2d 590 (1962).

JURISDICTION.

The judgment of the Court of Appeals was entered on August 20, 1962 (R 66). Petition for Rehearing was

denied on September 14, 1962 (R 68). The Petition for a Writ of Certiorari was filed on October 15, 1962, and was granted on December 17, 1962 (R 68).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), also Rule 37 (b) and 44 (a) F.R. Crim. Proc.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

The constitutional provisions, statutes, and regulations involved are set forth in the appendix, *infra*, pp. 1a-8a.

QUESTIONS PRESENTED FOR REVIEW.

I.

Whether the Court of Appeals correctly ruled that this Courts decision in *Dickinson* v. *U.S.*, 346 U.S. 389, 74 S.Ct. 152, applies only to cases which involve "ministerial status."

II.

Whether the Courts below correctly ruled that there was a *basis in fact* for the denial of petitioner's exemption as a conscientious objector to both combatant and noncombatant service on the ground of religious training and belief, on the sole ground that he was employed in a candy factory as a salesman, a small part of the products of which factory was purchased by the Armed Forces.

III.

The Local Board before which petitioner was classified, did not consider it fair to other registrants to grant to anyone a conscientious objector classification, exempting them from combatant and noncombatant service. That Board granted petitioner exemption from noncombatant

service only, even though acknowledging the sincerity of his claim. The Appeal Board classified the petitioner *de novo*, but gave him the same classification as the Local Board did. Did the Appeal Board's classification of *de novo* overcome the Local Board's illegal conduct and petitioner's deprivation of due process?

IV.

Was it a prejudicial error by the Trial Court, notwithstanding of the Court of Appeals' holding to the contrary, to prevent petitioner from presenting evidence attempting to overcome the Government's *ex parte* statement, alleging that the company that employed petitioner was manufacturing implements of war.

V.

Was it a prejudicial error on the part of the Trial Court, notwithstanding the holding of the Court of Appeals to the contrary, to permit the Government to place into evidence petitioner's Selective Service file and permit the same to be taken by the jury and at the same time depriving petitioner of the opportunity to offer evidence explaining the contents of the Selective Service file.

VI.

Did the Trial Court commit a prejudicial error, notwithstanding the Court of Appeals' holding to the contrary, to refuse an order requested by petitioner to have the Hearing Officer's report produced when the Department of Justice's recommendation addressed to the Appeal Board referred to such Hearing Officer's report, and when petitioner challenged the truthfulness of such recommendation as it was based on the Hearing Officer's report.

STATEMENT OF THE CASE.

A one-count indictment filed in the United States District Court for the Northern District of Illinois, Eastern Division, charged petitioner with refusal to obey the order of induction of his Local Board of the Selective Service System, No. 177, Sullivan, Illinois, in violation of Sec. 462, Title 50, App. U.S.C. (R 2, 3). On his plea of not guilty, following a trial by jury, he was found guilty (R 59). He was sentenced to two years and six months imprisonment and to a fine of $1,500.00 and cost of prosecution (R 62). On appeal to the United States Court of Appeals for the Seventh Circuit, the judgment was affirmed (R 67).

The trial proceedings may be summarized as follows:

1. After identifying it, the Government offered into evidence petitioner's Selective Service file. Petitioner objected to many of those documents on the ground that the draft board clerk identifying the file, Exhibits B-1-69 (SR 2-81), was not shown by the government to be the custodian of the records (R 12). On cross-examination of government witness draft board clerk, her attention was directed to the Index and the entry therein concerning the Department of Justice recommendation and she was asked whether the Hearing Officer's report or a résumé thereof is in the file. The government objected to the question and the objection was sustained (R 13).

Government witness Schuttler, Deputy Commanding Officer of the Induction Center in Chicago, testified (R 14 to 19) as to the appearance of petitioner at the Induction Center on November 19, 1958. The petitioner was asked

"if he will refuse and he said yes" (R 15) on the ground that he is a conscientious objector; that the witness was required to go through a prescribed ceremony to give the petitioner a chance to refuse officially. The witness explained the ceremony "whether he should step forward or whether he should not step forward at a given signal" (R 16). When Petitioner was told to take one step forward indicating his induction into the armed forces of the United States, petitioner remained standing and thereupon the witness reported petitioner's refusal to the United States District Attorney in Chicago (R 16).

On cross-examination, this witness testified that his duties are to supervise induction of those people who are physically, emotionally and morally fit for induction (R 17). The witness described the procedure to induct physically, emotionally and morally fit people into service (R 17-18).

Whereupon the government rested (R 19) and a motion for judgment of acquittal was presented, which motion was denied (R 19).

Petitioner called draft board clerk Kennedy as his witness. Because of the government's objections, and the objections being sustained by the trial court she did not answer the following questions: whether the last three pages of the ten-page questionnaire were part of government Exhibit B-1 (SR 3) when the same was handed to petitioner; whether the witness, as a draft board clerk, reviewed the regulations of Selective Service as they pertain to keeping and making a registrant's files; whether every document that is placed in the registrant's file is noted in a summary or in an index; whether there is any reference made to Government's Exhibit B-40 (SR 77) in the index; whether Government Exhibit B-8 (SR 39 to 44) was given or sent to petitioner; what is Govern-

ment's Exhibit B-26 (SR 59); whether there is a second letter from the Hearing Officer referred to in Government Exhibit B-36 (SR 66 to 72) (R 20 to 22).

A motion was presented on behalf of petitioner for an order upon government to produce Hearing Officer Brittingham's second letter referred to in T. Oscar Smith's second letter included in the file as Government Exhibit B-36 (SR 66 to 72) and the motion to produce was denied (R 22 to 23).

Thereupon a motion was presented on behalf of petitioner that the court order the government to produce for the perusal of the court *in camera*, the Hearing Officer's report referred to in Government's Exhibit B-36 (SR 66 to 72) for the purpose of the court determining whether the same is pertinent or relevant. The motion was denied (R 23).

Thereupon a motion was presented that the court order the production of Hearing Officer Brittingham's second letter referred to in Government's Exhibit B-36 (SR 66 to 72) under the decision of the Supreme Court of the United States in the *Gonzales* and *Watkins* cases. Motion was denied (R 24).

Defense witness Kenney was asked whether she, as a clerk of Local Board 177 ever heard a draft board member express an opinion as is set forth in Government Exhibit B-8 (SR 39 to 44) that he doesn't believe that there is any such thing as a real conscientious objector, to which question the government objected and the objection was sustained. This defense witness was asked whether she, as a clerk, heard any draft board member express an opinion similar to that contained in Government's Exhibit B-8 (SR 39 to 44) that any person who lives in America should be willing to fight for his country whether or not he is by religious training and belief opposed to partici-

pation in war, to which question the government objected and the objection was sustained (R 24-25). The witness was asked whether Local Board 177, while she was a clerk ever gave anyone a classification of 1-O, to which question the government objected and the objection was sustained.

Felix Hagerman was called as a witness for petitioner however, when he was asked whether he holds any office in the Church of Jesus Christ, Sullivan, Illinois, the government objected. Defense counsel explained that the purpose of the question is to present evidence since the government's Exhibits charged that the church was manufacturing certain war goods, and this witness, if he qualifies, would be able to say whether that evidence is true or false. The government objection was sustained (R. 25-26).

Because of the objections of the government and the trial court sustaining the objections, this witness could not answer the following questions: whether or not he has theretofore seen government's Exhibits B-3 (SR 16 to 19), B-4 (SR 20 to 38), and B-5 and B-24 (R. 26).

The witness had seen government's Exhibit B-41, however, objection was made to any reference to the Hearing Officer by the name of Brittingham mentioned in that Exhibit and the objection was sustained. So was the objection to the question whether this witness while he, pursuant to authorization, inspected petitioner's Selective Service file, saw a report therein by Hearing Officer Brittingham. Objection was made and sustained to the question whether this witness appeared with petitibner before Hearing Officer Brittingham (R 27-28). Objection was made and sustained to the question whether the witness appeared with petitioner before the local board.

This witness was connected with Community Industries for approximately 15 years. He is the Executive Vice President and Treasurer. When the question is asked whether he knows the products which were manufactured by the company in the last 15 years there was an objection by the government and the objection was sustained and the answer was stricken and the jury was directed to disregard it (R 29). The witness is acquainted with the tenets of the Church of Jesus Christ of Sullivan, Illinois, however, the question whether a member in good standing could even manufacture ammunition was objected to and the objection was sustained (R 29).

Witness knows that petitioner is a member in good standing of the Church of Jesus Christ, that he participates in the work and worship of the church. The witness, because of the objection of the government and the sustaining of the objection, could not testify as assistant pastor of the church as to the regular service thereof (R 29).

Whereupon, petitioner made an offer of proof to the effect that if witness Hagerman had been permitted to answer questions directed to him, he would have testified that as Executive Vice President of Community Industries Ltd., he knows that it was and is a manufacturing company and that the church never participated in the manufacturing process in any form. That the manufacturing company made candies, ladies' dresses, tents, garden tractors, snow removing tractors, and such things. That Community Industries never manufactured any war goods. All items were manufactured for civilian purposes. Candy could be and was used by the government in survival kits. It is true that some of the dresses were purchased by the government. It is possible, though the witness has no information about it, that some of the garden and

snow removal tractors which were sold to distributors throughout the country may have been purchased by the government. None of these items were manufactured by the church either directly or indirectly. That he understands the teachings of the church and no member of the church in good standing would ever manufacture items used solely for destructive purposes. That no member in good standing, and petitioner is a member in good standing, would manufacture bullets, machine guns, tanks, poison gases, submarines or other destructive items (R 30).

The government objected to the offer of proof and the objection was sustained (R 30-31). Whereupon, the following colloquy took place outside the hearing of the jury between counsel and the court:

> "Mr. Bittman: Your Honor, I again make an offer to Mr. Heisler if he would like to question this witness before the Court on these issues and give the Government an opportunity for cross examination outside of the presence of the jury, the Government would have no objection.
>
> "Mr. Heisler: I would like to say, your Honor, that Mr. Bittmman's statement that 'I again make this offer' is not based on facts because this is the first time that I heard him making any such offer, and I don't want the record to stand that he again makes this offer.
>
> "The Court: What would be the purpose of having counsel for the defendant do that?
>
> "Mr. Bittman: I believe that in Mr. Heisler's offer of proof he makes some statements which I do not believe to be a fact.
>
> "The Court: I think some statements in the offer run counter to certain Government exhibits which have been admitted into evidence, which exhibits are signed by some representative of the church.

"Mr. Bittman: That is correct.

"The Court: But I am not trying this man's classification *de novo*. My obligation was to examine the file as it has been admitted into evidence and to determine whether there was a basis in fact. Now I can't see how it would profit us, to get into a dispute here as to whether this witness is right as against some statements that might have been made in the exhibit.

"Mr. Bittman: The Government objects to this testimony going before the jury.

"The Court: It isn't a matter of his testimony, it is a matter of those questions which have been asked and as to which objections have been sustained, and considering the so-called offer of proof, the Court has sustained the Government's objection to the offer.

"Mr. Heisler: I understand, your Honor, that the Government withdraws then the offer that is on the record?

"The Court: About the offer, do you mean the offer to ask these questions outside of the presence of the jury? What would be the purpose of it?

"Mr. Heisler: No, I thought that he withdrew it.

"Mr. Bittman: I withdraw that, although I would say that my basis of objection to the offer of proof is on the basis it is not for jury determination.

"The Court: I don't think it is necessary to have the answers to the questions where the questions themselves are palpably objectionable.

"Mr. Heisler: If your Honor please, just to be sure that I understand the Government's position, I believe that there would be a purpose and therefore I suggest that I should be permitted to ask these questions after the Court sustained objection to the offer of proof.

I can ask the question before the Court.

"The Court: For what purpose?

"Mr. Heisler: So the Court can determine whether or not there is a basis of fact in the record.

"The Court: Oh, no. I considered the basis in fact on the Selective Service file.

"Mr. Heisler: I understand that, your Honor. (fol. 37).

The Court: I am not going to let some outside witness, for example, the the witness now on the stand, by extraneous statements determine whether there is a basis in fact.

"Mr. Heisler: . . . assuming now, your Honor, that the Court would find that some of these exhibits, Government exhibits, are patently false, but they are in the file, does that mean, your Honor, that the Court feels that even then the Court cannot go beyond the Government's exhibits?

"The Court: I will stand on my ruling."

Whereupon witness Hagerman testified that he knew petitioner nearly all his life and that his reputation in the community of Sullivan, Illinois is excellent (R 32).

Whereupon petitioner testified that he lives in Sullivan, Illinois where he was born 26 years ago; that he is the great-grandson of the founder of the Church of Jesus Christ whose name was Samuel Rufus Harshman and that the present pastor's name is Leah L. Harshman and he is her great nephew. That there was another minister by the name of Joel Richard Bradley and petitioner is his grandson on his mother's side. He has been a member ever since he was 15 years of age and he attends church regularly twice a week, so do his parents and his three sisters all of whom are members of the church. That Government Exhibit B-1 (SR 3 to 10) is a questionnaire that he filled out. On page 4 thereof (SR 5) he stated that his job was to "assemble piece

goods from cutting table in dress factory", which manufactures ladies' ready-to-wear and is part of the company known as Community Industries. As the material was cut out in thicknesses from 2 to 250 pieces, his job was to number the individual pieces so that they may be properly assembled. Petitioner worked in the dress factory after school and on Saturdays and whenever he was free while a freshman in high school. He worked full time in the summer. During that time he recalls three manufactured items which he assembled, namely, cook's coats, mattress covers and cooling suits made of perforated material. He also worked in the garden tool division of the Community Industries after school and during one summer. At the present he is employed in the candy division. While working in the garden tool division they manufactured a two-wheel tractor consisting of a power unit and four or five attachments such as rotary mower, disc and snow plow. The three divisions of Community Industries are the George Garden Tool Division, The Felicity Fashions Division and the Lucy Ellen Candy Division. He went to work for the candy division after school in his senior year. His first job was that of a janitor, cleaning up sweeping and mopping the starch. Then he was feeding chocolate bars into the enrobing machine. Then he worked on the sanding machine that puts the outside coat of sugar on the candy. After about six months, he was assisting the buyer of raw materials. Then when he finished his school he was asked to become a part of the sales force of the candy factory. He is now a factory representative with the title of District Sales Manager. In his work he applies the sales plans in a given area and represents the factory with the candy brokers who do the direct selling in their area. He has had this job for four years (R 33 to 35).

The government objected and objection was sustained to the question whether petitioner did, in four years, ever sell candy to the armed forces of the United States.

Petitioner continued with his testimony to the effect that he signed page 7 of Government Exhibit B-1 (SR 7) whereby he requested a special form for conscientious objectors. He also stated on the form that by reason of his religious training and belief he is conscientiously opposed to participation in war in any form. He received the special form which is in evidence as Government Exhibit B-2 (SR 11 to 15). He submitted the same to the draft board after completion. In this form he struck out the claim for exemption from noncombatant service only and validated the claim for complete exemption. After that he received a classification of 1-A-O which he learned meant entering the armed forces in a noncombatant capacity. He appealed to the appeal board but before that he appeared personally before the draft board. After that he prepared a summary of a discussion that he had with the draft board and this discussion is in Exhibit B-11 (SR 45 to 47). He remembers draft board member Clancy with whom he had a conversation (R 35-36). The government objected and the objection was sustained when petitioner was asked to relate the conversation that he had with board member Clancy (R 36).

Petitioner was not permitted to answer the questions what he learned from Exhibit B-11 about the law pertaining to conscientious objectors; whether he was instructed to appear before a Hearing Officer known as Francis Brittingham. Government objected to the questions and objection was sustained (SR 36).

Petitioner then testified that he signed the statement which is in evidence as Government Exhibit B-17 (SR

51 to 54). Petitioner read Government Exhibit B-36 (SR 66 to 72) wherein on page 2 reference is made to a prior report of the Hearing Officer that was made in 1954 (SR 70) where it is stated that the Hearing Officer concluded that petitioner is not entitled to 1-O classification because the company that employs him is producing material for military consumption (R 37). The government objected and objection is sustained to the question whether petitioner had seen anything like that in the Hearing Officer's report. Objections were made and sustained to the following questions: In Exhibit B-36, the Assistant Attorney General says that "The registrant—meaning you—stated that it is not a violation of their Christian duty to manufacture goods for military consumption. Did you ever make such a statement . . ." Another question was unanswered where the petitioner was asked whether petitioner would be willing to be employed in a plant which manufactured guns. Still another one that was left unanswered was one based on the assumption that Community Industries would suddenly turn to the manufacture of candy bars impregnated with bacteria to be handed out to our enemies, whether petitioner would be willing to work for the company (SR 37).

Whereupon petitioner offered proof (R 38 to 41) that if he would have been permitted to answer the questions to which objections were made and sustained, he would have testified that Government Exhibit B-36, the letter of the Assistant Attorney General (SR 69 to 72) is false in the following particulars: It is not true that the Hearing Officer in 1954 concluded that in view of petitioners's employment with a concern producing material for military consumption he thereby failed to sustain his claim for exemption. This letter is false when

it states that the Department of Justice concurred with the Hearing Officer that he be given 1-A-O classification because to the contrary the Hearing Officer in that prior report accepted the recommendation of the Department of Justice that no member of the Harshmanite church can be given 1-O classification. Oscar Smith's letter is false in the further respect when it states that petitioner expressed an opinion that it is not a violation of his Christian belief to manufacture goods for military consumption, in fact, no such question was asked of him by the Hearing Officer or anyone else. Similar questions were asked of him and he answered that the company that employed him for the past 8 years never manufactured anything other than goods for civilian consumption although a small part of it may have been purchased by the government. That the Smith letter is further false when it states that petitioner said to the Hearing Officer that he doesn't accept responsibility for actions of persons who use such products. That such question was not asked of him but a similar question was asked and answered by him to the effect that his employing company is manufacturing civilian goods and that nothing could be done in this country by a person who would refuse to make anything that could not be used for military purposes. He could not raise corn because corn pone could be fed to the armed forces (R 38-39). The offer of proof further stated that petitioner would have testified that he would, under no circumstances, engage in the manufacture of any war materials such as bullets, tanks, poison gases because that would be contrary to his belief and it would be contrary to his mission on this earth. That he accepted the teachings of the Church of Jesus Christ of Sullivan, Illinois, and that in accordance with such teachings he cannot accept the noncombatant service because of the

New Testament injunction "love your enemies". That he knows from his own knowledge, from his parents and from his pastor that the Church of Jesus Christ never manufactured any merchandise either civilian or military, it being a spiritual organization which never did nor does not now own a manufacturing establishment. That his employing company is an Illinois corporation owned by stockholders and during his eight years employment with that company it was engaged solely in the manufacture of civilian goods. He does not know whether the mattress covers which he helped manufacture were purchased by the army. He doesn't know whether the cooling coats or any of the candy he was working on was purchased by the army but it could have been (R 39-40).

The offer of proof further said that petitioner in the four years that he was engaged as a salesman he never sold any candy to any military authorities or to the government. All his customers are civilian establishments such as groceries and chain stores. That he as a good church member owes the government any service that it might demand that does not involve personal participation in the act of war (R 40).

That on December 19, 1955, he appeared before his draft board personally and asked that he be given a 1-O classification because under the law he is entitled to it and because he made out his case and the draft board never doubted his sincerity and honesty. When the board denied him his classification he asked for the reason thereof. One board member, Saxton, answered that as far as he was concerned there was no such thing as a conscientious objector opposed to both combatant and noncombatant service and the acting chairman of the board told him that to get the classification of 1-O,

petitioner would have to leave the country and that the best place for him to go would be Canada. When he asked the board members whether they believed in his sincerity as a conscientious objector they unanimously stated that they certainly did (R 40-41).

The offer of proof further stated that when petitioner first appeared before Hearing Officer Brittingham in 1954 he was told that the Hearing officer would give him 1-O classification but pursuant to a letter that Brittingham received from T. Oscar Smith he is precluded from granting to him or any member of the Harshmanite church 1-O classification. Mr. Brittingham expressed a great deal of sympathy and understanding for the position of petitioner; that he believed in his sincerity, honesty and integrity and that while Brittingham believed that there ought not be a 1-O classification, as long as there is one the same ought to be given to petitioner and to other members of his church.

Petitioner would have further testified that the same statement was made to him by Hearing Officer Brittingham during the second hearing in 1956 contrary to the statement made by Smith in Government Exhibit B.36 (SR 71) (R 41). The government objected to the offer of proof and the objection was sustained (R 41).

Petitioner then further testified before the jury that he heard Captain Schuttler testify as to the induction ceremony. However, because of the objection of the government and the court sustaining the objections he was not permitted to answer the question whether he, when he remained standing and thus refused induction intended to violate any of the laws of the United States and what prompted him to remain standing when he did so at the induction center. When he was told by Captain Schuttler

about the penalty which may be attached for his remaining standing what prompted him to do so nevertheless; whether during his 26 years of life he ever violated a criminal law of the state of Illinois or of the United States (R 42-43).

Thereupon petitioner offers proof that if he would have been permitted to answer the question he would have stated that by taking the step forward at the induction center he would have violated his Christian conscience; that he remained standing pursuant to the command of the Lord. The government objected to the offer of proof and the objection was sustained (R 43).

On cross examination petitioner testified that he wrote Government Exhibits B-11 and B-12 (SR 45 to 47) and (SR 48 to 50) he mailed a number of letters to Selective Service and they were never returned to him. He was classified 1-A-O and that he knows to be for members of the armed forces in noncombatant service; that that is one of the two conscientious objector classifications and the other is 1-O. He was always classified 1-A-O. He received an order to report for induction and he reported. Government Exhibits B-60 (SR 79) shows the induction date as November 19, 1958.

He had a conversation with Captain Schuttler in his office as he testified to on direct examination. The law was explained to him twice (R 43-44). On re-direct examination petitioner, because of government's objection that was sustained was not permitted to answer the question whether at the time when he was given the choice by Captain Schuttler to step forward or not, did he believe that the classification 1-A-O given to him was given in violation of the law (R 44).

Thereupon petitioner offered proof to the effect that when he remained standing he was aware of Section 6 (j) of the Military Training and Service Act which provides that a person who, because of his religious training and belief is conscientiously opposed to participation in military service in any form, be given, in lieu of induction, the opportunity to do civilian work for 24 months. That he knew at that time, that his Selective Service file, the documents therein, his standing in his church, the conduct of his life, all proved that he was entitled to 1-O classification and that he was convinced that such classification was denied to him because the draft board, the appeal board and the Department of Justice were all biased and prejudiced against him and against members of his church, and he believed that the order of induction based on the classification given to him was not in accordance with the rules and regulations and the law, and that it was a void order and that therefore, he was not bound to obey it. Government objected and the objection was sustained (R 44).

Thereupon William Edward Rider, presently the principal of Lombard High school, Lombard, Illinois, and formerly petitioner's teacher in the Sullivan High school, testified that his honesty, sincerity and integrity is excellent. To the same effect testified Barbara Leah Harshman, a sister of petitioner (R 45).

At the close of all the evidence, petitioner moved for a judgment of acquittal on the grounds theretofore presented and on the further ground that petitioner's testimony indicates that there was no basis in fact for the classification given to him and there was no basis in fact to deny him a classification of 1-O. Further, that Government Exhibit B-36 is untruthful and that the same is based on bias, prejudice and suspicion. The court ruled that

there is a basis in fact, and therefore, petitioner's motion for judgment of acquittal was denied (R 46).

Thereupon a discussion was had in absence of the jury between court and counsel concerning the instructions. Petitioner objected to government's instructions Numbers 1, 11, 14, 18, 19, 22, 23, 24, 26, 27 and 28. Objections were overruled as to all government's instructions, except 22 which was withdrawn by the government (R. 46-47). The government objects to all petitioner's proffered instructions and the court sustained objections to G, H, I, J, K-1, K-2, L, M, N, O, P, Q, R, S with the statement that a substitute instruction will be given for S. Objection is sustained to petitioner's instructions T and U (R 47). Thereupon a stipulation was entered into as to the exception of the court's ruling pertaining to the instructions and further that a sealed verdict may be had (R 47-48).

Closing argument by the government counsel without any interruption by defense counsel (R 48). Closing argument by defense counsel on behalf of petitioner interrupted by government counsel repeatedly (R 48).

Thereupon the court instructed the Jury (R 49 to 53).

Defense's rejected instructions appear on R 53 to 58.

Thereupon the jury returned the verdict finding petitioner guilty as charged in the indictment and judgment was entered on the verdict (R 59). Thereupon, on behalf of the petitioner a motion was presented to the court for a new trial. The court offers to set aside the verdict of guilty and to dismiss the indictment provided petitioner submits to induction under the classification given to him. Petitioner answers that he cannot accept the 1-A-O classification (R 59). The trial court then states to defense counsel that it is

> "not impressed by this idealism and this excessive zeal for any particular faith when a resourceful criminal lawyer is employed to do what you have done in this case, availing yourself of every tactic to circumvent the law by flying in the face of my instructions and despite the fact, the government, with my approval, and I with the government's approval am willing to let this boy serve as a conscientious objector" (R 60).

Defense counsel offers to put in the record that he tried cases in various circuits and before many federal judges that he has tried cases of a great many conscientious objectors and "this is the only time that I (defense counsel) have ever been accused of trying to use any tactics to circumvent the law. I thought I wanted to enforce the law which I saw in this case was doubtful (R 60)."

The Court then addressed the defense attorney to the effect that:

> "Let me say on the record here that I mention it not so much in criticism of you but it seems to me that these people who are willing to pay a resourceful criminal lawyer to do what you do for them don't have the lofty ideals that they pretend to have." (R 60).

To which statement defense counsel answers:

> "It may be a surprise to your Honor that I defended hundreds of cases without any fee, so that was not the issue, and probably the court would be surprised that probably my resourcefulness was not paid in dollars and cents. But I think I was paid because I believe that I was doing the right thing, even though your Honor doesn't believe so."

To which the trial court retorts: "You don't look undernourished Mr. Heisler." (R 60).

The government objects to petitioner's motion for a new trial and the trial court stated that that question of law was fully argued, but heard defense counsel in connection with the sentence (R 61). Thereupon the court gives an opportunity for petitioner to speak on his own behalf, which he does, and he states that he will accept the judgment of the court which will be passed on him

> ". . . according to the verdict rendered by the jury, as the Lord's Will to me. I praise Him and I am still free in spirit and soul to praise Him from the bottom of my heart for the Grace and Courage to witness for Him in this Courtroom. I know that it matters not where I go because I am told that since I know I am a Son of God, I will have His Love, His Holy Spirit going with me, whether in a penitentiary or on a street, a sidewalk, or in a Courtroom, and I only am very happy and thankful for the opportunity to witness for Jesus Christ and for the salvation that He did give to mankind of which I partook.
>
> "I know that it is the Lord's Will to me and I will accept it as such, and I know that all good things, all things work together for good, to those that love the Lord, and I know that nothing can separate me from the Love of God. I can serve my Maker in jail or at work." (R 62).

Thereupon the trial court sentenced petitioner to be imprisoned for a period of two years and six months and that he pay a fine of $1,500.00 and costs of prosecution. That he stand committed until fine and costs are paid. Appeal bond was set in the amount of $5,000.00 (R 62),

Judgment, and Commitment (R 63-64).

Notice of Appeal (R 64-65).

Opinion of the United States Court of Appeals for the Seventh Circuit (R 66-67). The opinion refers to a com-

panion appeal No. 13585 entitled *United States* v. *Malcolm Lebert Parker* filed simultaneously with this case on August 20, 1962 and concludes that the court's decision in *United States* v. *Parker* controls the decision here, and accordingly the judgment in this cause is affirmed (R 67).

Judgment of the United States Court of Appeals for the Seventh Circuit (R 67-68).

Order denying Petition for Rehearing dated September 14, 1962 (R 68).

Order of the Supreme Court of the United States allowing Certiorari filed December 17, 1962. (R 68).

SUMMARY OF ARGUMENT.

(Explanatory Remarks.)

Since the United States Court of Appeals for the Seventh Circuit affirmed the judgment for reasons given in *United States* v. *Malcolm Lebert Parker,* No. 13585, which case is now on Certiorari before this court as No. 516, when reference is made to the Court of Appeals opinion, we shall refer to it as it is printed in *United States* v. *Parker,* No. 516. To distinguish such reference the same will be denoted thus: (Parker R .....)

I.

The Court of Appeals misread and misinterpreted the holding of this Court in *Dickinson* v. *United States,* 346 U.S. 389, 74 S. Ct. 152. Petitioner claimed that having established *prima facie,* that he was entitled to a full conscientious objector classification, exempting him from both combatant and non-combatant service (1-O) and his sincerity in making his claim never having been questioned, he was entitled to such 1-O classification in ab-

sence of evidence in the record contrary to his claim. The Court of Appeals ruled against petitioners contention by holding that the *Dickinson* case is inapplicable here because that holding applies only to persons claiming ministerial status, a matter to be decided on objective facts.

The interpretation of the Court of Appeals of the *Dickinson* case is erroneous in face of other holdings of this Court and the holdings of various other Circuits of the United States Court of Appeals.

II.

It was error on the part of the Court of Appeals to hold that the Hearing Officer of the Department of Justice found anything in the absence of the Hearing Officer's report. This holding is particularly grievous because the trial court refused to order the government to produce the Hearing Officer's report notwithstanding petitioner's offer of proof which contradicted substantially all statements contained in the Department of Justice's recommendation (Exh 18 (SR 55-69)) referring to the alleged Hearing Officer's report.

The Court of Appeals erred in holding on the basis of the "secret" Hearing Officer's report that petitioner chose, merely as a preference and not as a religious belief, to refuse to manufacture munitions in face of the petitioner's offer of proof rejected by the Trial Court that he would not, because of his religious training, manufacture anything used for destructive purposes. The Court of Appeals erred to the prejudice of the petitioner when it relied on the "secret" Hearing Officer's report as a basis in fact to support the classification given to petitioner, *United States* v. *Wilson*, 215 F. 2d 443, *Sicurella* v. *United States*, 348 U.S. 385, 75 S.Ct. 403, *Batterton* v. *United States*, 260 F. 2d 233.

III.

The rejected offer of proof on behalf of petitioner's witness, Hagerman (R 30) and petitioner's own offer of proof (R 38-41, 43, 44) and Government's own Exhibit B-29 (SR 63), was undenied and undeniably showed bias of the Local Board and showed a disregard of the law by that Board. Nevertheless, the Court of Appeals held that since the Appeal Board provides a *de novo* proceeding, there is no showing that the prejudice of the Local Board, if any "corrupted the decision of the Appeal Board". This holding of the Court of Appeals is clearly erroneous because petitioner was entitled to a fair and unbiased consideration on every step of the proceedings. The error of the Court of Appeals is compounded because both the Local Board and the Hearing Officer who saw petitioner face to face were convinced of petitioner's sincerity in making his claim (Exh B-17 (SR 53); Exh B-18 (SR 55); Exh B-36 (SR 64), while the Appeal Board had no such opportunity to face petitioner. Its *de novo* proceedings were based solely on documentary evidence.

It was further error to rely on Government's Exhibit B-36 (SR 69), which was not only attempted to be contradicted by petitioner's various offers of proof, but also by his request for an order to produce the Hearing Officer's report and by the Government's own Exhibit B-39 (SR 73). *Sicurella* v. *United States*, 348 U.S. 385; 75 S. Ct. 403.

IV.

The Court of Appeals in accepting the statements contained in the Department of Justice's recommendation to the Appeal Board (Exh B-18 & 36) (SR 55 & 69) as gospel truth notwithstanding of the repeated attempts

on the part of petitioner to show that the recommendations were based on falsehoods, departed from the basic tenet of the Anglo-Saxon law which teaches that one charged with a crime (even when the alleged crime is based on one's religious teaching and belief) must be found guilty beyond a reasonable doubt. The Court of Appeals, contrary to that teaching, deprived petitioner of the benefit of this Court's holding in *Sicurella v. United States*, 348 U.S. 385, 75 S.Ct. 403, and of the benefit of *Batterton* v. *United States*, 260 F. 2d 233.

V.

If it is error to submit the Selective Service file to go to the jury, as the Court of Appeals held, such error is not eliminated by the fact that the jury was permitted to hear oral evidence as to the substance of the contents of that file. The Court of Appeals erred when it held that no prejudice resulted to petitioner. The error was the more prejudicial because petitioner was not permitted by the Trial Court to explain some of the matters, contained in the file which went before the jury and he was not permitted to show which part of the file prepared by him contradicted other documents in the file, *Cox* v. *United States*, 332 U.S. 442; 68 S. Ct. 115, *Smith* v. *United* States, 157 F. 2d 176.

VI.

The Court of Appeals erred to the prejudice of petitioner when it held that the Trial Court's refusal to order the production of Department of Justice's Hearing Officer's second report was no error. The Court of Appeals erred because in the instant case the Hearing Officer's report was crucial to prove or disprove petitioner's claim that the Department of Justice's recommendation to the Appeal Board (Exhibit B-36 (SR 69) was false, *Gonzales* v. *United States*, 364 U.S. 59, 80 S. Ct. 1554.

ARGUMENT.

I.

THE COURT OF APPEALS MISREAD THIS COURT'S DECISION IN DICKINSON v. UNITED STATES, 346 U.S. 389, 74 S. Ct. 152, AND THEREBY DEPRIVED PETITIONER OF THE BENEFIT OF THAT HOLDING.

In the opinion of the Court of Appeals (Parker R 60 to 66), *Witmer* v. *United States*, 348 U.S. 375, 75 S. Ct. 392 is cited to the effect that "in that case, the Court interpreted *Dickinson* to hold that there was no basis in fact for the classification because there was no evidence, 'incompatible with' *Dickinson's* proof, to rebut his prima facie case, made out by objective facts". The Court of Appeals looks upon the 'objective facts' as the determinant in this Court's holding in the *Dickinson* case, and therefore, it says "that distinguished Witmer's case from Dickinson's and distinguishes Harshman's. In *Witmer* and here, the question cannot be determined on objective facts such as Dickinson's which involved ministerial status". That such narrow interpretation cannot be foisted upon *Dickinson* is clear because this Court in that case relied on *Estep* v. *United States*, 327 U. S. 114, 66 S. Ct. 423, when it quoted therefrom to the effect that ". . . the question of jurisdiction of the Local Board is reached only if there is no basis in fact for the classification which it gave the registrant" (on page 156). The dissenting opinion of Justice Jackson (joined by Justices Burton and Minton) says that "This Court held in *Estep* v. *United States*, 327 U.S. 114, 66 S. Ct. 423, 427, 90 L. Ed. 567, that in a criminal prosecution under § 11 of the Selective Service Act, the Court must

allow the registrant to prove his local draft board acted without jurisdiction in classifying him for service".

Reading the *Dickinson* and *Estep* cases, it is patently clear that the restriction placed by the Court of Appeals for the 7th Circuit in the *Dickinson* case cannot be upheld. Nowhere in the *Dickinson* case did this Court say (nor did any other Court of Appeals as far as our research discloses) that the *prima facie* case made out by a registrant may be disregarded by the Board *except* when one claims ministerial classification, even though the record discloses no *basis in fact* that is contrary to the registrant's claim. But that is exactly what the Court of Appeals held when it said (Parker R 63) "Once *Dickinson's* status was determined prima facie, the Government was required to produce a basis in fact on which the Court could decide his claims were not as stated. In Harshman's case the question is whether there is affirmative evidence produced by the Government that he has not painted a complete or accurate picture, *Witmer* v. *United States*, 348 U. S. 375, 382 (1955)." The juxtaposition of the above two sentences in the Court of Appeals' opinion indicates clearly that that Court applies the teaching of the *Dickinson's* decision of this Court solely to those who claim ministerial exemption and then if a *prima facie* case is established by such minister to the exemption, then the Government is required to produce a *basis in fact* contrary to his claim. But not so in the case of this petitioner, because in his case, the Court looks to affirmative evidence that proves that he has not "painted a complete or accurate picture". While it is difficult and probably impossible to fathom the distinction between the content of the term "a basis in fact" and the content of the term "affirmative evidence", nevertheless, it is clear that

the Court of Appeals did restrict the *Dickinson* holding and distinguished that case in disfavor of petitioner.

The Court of Appeals also relies on its own holding in *United States* v. *Simmons* (*Seventh Circuit*), 213 F. 2d 901, (reversed by this Court on other grounds, 348 U.S. 397) and quotes from *Witmer* v. *United States*, 348 U.S. 375, to the effect that "'When the record discloses any evidence of whatever nature which is incompatible with the claim of exemption', court may not inquire further as to the correctness of Board's order". Petitioner submits that this Court in the *Witmer* case spoke of legal evidence and not something or anything which may be in the record. This Court did not hold in that case, or in any other case for that matter, that it is sufficient for the Government in a Selective Service case to present a letter from the Department of Justice directed to the Appeal Board and look upon the statements therein contained as evidence satisfying the *Witmer* holding, particularly not when as here, petitioner challenged the veracity of many of those statements and when he particularly offered proof (after his testimony was suppressed) to contradict many, if not all the statements in the letter from the Department of Justice.

Petitioner submits that this Court's holding in the *Dickinson* case applies not only to those who claim ministerial exemption, but it applies also to those, as petitioner, whose claim can be tested by subjective evaluation, as against the objective evaluation applied to *Dickinson*. The question of sincerity, truthfulness, honesty and integrity may not be measured by mechanical tools, but measured they can be. In fact it was done by the Local Board, which not only did not question petitioner's sincerity, but stated that it believed him to be so. The Hearing Officer of the Department of Justice, again using

subjective evaluation, found him sincere, and these were the two instances where petitioner was face to face to the inquirer. He submits that the teachings of *Dickinson, Sicurella, Simmons* and *Witmer* and on the whole of the record here, there is no *basis in fact* for the Board's denial of his claim to be fully exempt from all military service. There is no *basis in fact* for the Board's classifying him as one to be exempted from combatant service only.

On the record and on the law, petitioner submits that his conviction cannot be upheld.

II.

ON THE RECORD THE SOLE GROUND ON WHICH THE COURTS RULED THAT THERE WAS A BASIS IN FACT FOR THE DENIAL OF PETITIONER'S CLAIM FOR EXEMPTION FROM ALL MILITARY SERVICE WAS THE INCIDENT THAT HE WAS EMPLOYED IN A CANDY FACTORY AS A SALESMAN, A SMALL PART OF THE PRODUCTS OF WHICH FACTORY WERE PURCHASED BY THE ARMED FORCES. THIS RULING OF THE COURTS BELOW WAS ERRONEOUS.

The Government introduced into evidence, from petitioner's Selective Service file a letter (Exhibit B-36) (SR 69) that was written by the Department of Justice to the Appeal Board as its recommendation concerning petitioner's classification (R 11, 12). This Exhibit refers to petitioner's appearance before the Hearing Officer appointed by the Department, and states that officer "was impressed with registrant's attitude during the course of the hearing". He concluded "that the registrant is a sincere and conscientious member of his faith." The Government also introduced into evidence as its Exhibit B-27, which shows that the Local Board

similarly found petitioner to be sincere and honest, and that he is a good member of his Church. We may assume that the Court of Appeals followed the holding of this Court in the *Dickinson* case, and particularly that it had before it Justice Jackson's dissenting opinion. That dissent holds that "The board must find and record affirmative evidence that he has misrepresented the case—evidence which is then put to the test of substantiality by the courts. In short, the board must build a record". We may so assume that the Court of Appeals did just that, because it is said on page 3 of the opinion (Parker R. 62):

> "The Department of Justice hearing officer on Harshman's appeal to the Appeal Board found that Harshman worked for Community Industries, a Harshmanite enterprise, which produced WAC uniforms, candy for army ration, valves used on naval vessels, and other items usable in war; that Harshman did not consider it immoral or a violation of his Christian duty to manufacture ammunition; that Harshman viewed the Harshmanite 'reluctance to manufacture munitions * * * not [as] a matter of religious belief, but merely a matter of reference'; and that Harshman subscribed to the beliefs and opinions of the Harshmanites."

If the above paragraph sums up the record which the board built, then we say that such cannot be considered a *basis in fact* on which to classify petitioner contrary to his *prima facie* established case. It cannot be so held because the above summary of the Court of Appeals is taken not from the record, but from the letter of the Department of Justice (Exhibit 18 & 36), (SR 55 & 69) which was challenged by petitioner during his trial as to its factuality and veracity.

The Court of Appeals held that the Hearing Officer found certain facts. This is a misstatement, because the Court of Appeals cannot know what the Hearing Officer found because the Trial Court refused to order his second report into Court, even though the same Trial Court admitted into evidence the Department of Justice's letter (Exhibit B-36) (SR 69) which was challenged by petitioner as to that portion of it which referred to the Hearing Officer's report.

There is a further misstatement in the Court of Appeals summary quoted above, since the Community Industries employing the petitioner is *not a Harshmanite enterprise*, but it is a simple Illinois corporation owned by the stockholders. The Court of Appeals is further misled by the Department of Justice's letter (Exhibit B-18 & 36) (SR 55 & 69), when it held that petitioner's employing company "manufactured WAC uniforms." There is not one word of evidence in the record that such is the case, and the only source that the Court of Appeals had was the challenged letter of the Department of Justice. The Court of Appeals was further misled when it held that the employing company produced "materiel (*sic*) for military consumption." This is again taken from the Government's Exhibit B-36 (SR 69), the veracity of which was so clearly challenged by petitioner (R 23, 29, 30, 37, 38).

The only evidence as to the kind of goods purchased by the government from the petitioner's employing company is the rejected offer of proof of his witness, Hagerman (R 30-31) and the similarly rejected offer of proof of petitioner (R 38 to 41).

There is a further statement in the Court of Appeals' opinion which is difficult to contradict when it says that

Community Industries produced "other items usable in war." We are hard put to think of anything produced that war could not consume, be it bread, oyster forks to be used in officer messes, medicine to be used in military hospitals, bandages, etc. However, petitioner submits that such a general statement may not be considered as a basis for his disqualification as a conscientious objector.

The Court of Appeals also found that petitioner

> "did not consider it immoral or a violation of his Christian duty to manufacture ammunition; that Harshman viewed the Harshmanite 'reluctance to manufacture munitions * * * not [as] a matter of religious belief, but merely a matter of preference;' and that Harshman subscribed to the beliefs and opinions of the Harshmanites."

Such a holding is not bottomed on any other part of the record but upon the contradicted statement of the Department of Justice (Exhibit B-18 & 36) (SR 55 & 69). Otherwise, the record is wholly to the contrary, because a defense witness who is the assistant pastor of the Church of Jesus Christ stated that "Community Industries never manufactured any war goods" (R 30). This witness' testimony was in direct contradiction to the statement contained in Exhibit B-36 (SR 69), which says that petitioner's "employment with a concern producing materiel (*sic*) for military consumption" (SR 70) negated his claim of exemption. While the testimony was in the form of an offer of proof that was rejected because of the objection of the government (R 30-31) however, the government counsel offered to have this witness testify in accordance with his offer of proof and thus "give the government an opportunity for cross examination outside the presence (*sic*) of the jury" (R 31). The trial court however, saw no purpose in such examination and held that

It is not "necessary to have the answers to the questions where the questions themselves are palpably questionable" (R 32). The trial court said that it is

> "not going to let some outside witness, for example, the witness now on the stand by extraneous statements, determine whether there is a basis in fact" (R. 32).

However, the offer of proof, albeit rejected, was in direct contradiction of Government's Exhibits 18 and 36 (SR 55 and 69) in that he, holding an office of honor in the Church of Jesus Christ (R 25) and having been connected with the Community Industries Ltd. for 15 years, at the present, Executive Vice President and Treasurer (R 28-29) knows that

> "Community Industries never manufactured any war goods but all manufactured items were for civilian purposes; that it is true that candy could be and was used by the government for survival kits; it is true that some of the dresses that the factory manufactured were purchased by the government for one or the other services; it is possible, while he has no information about it, that some of the garden tractors or some of the snow removal tractors which were sold to distributors throughout the country may have been purchased by the government. He would have testified that none of these items were manufactured by the church directly or indirectly. . . . he understands the teachings of the church . . . no member of the church in good standing would ever manufacture any items which can be used solely for destructive purposes . . ." (R 30).

The above offer of proof fairly contradicts, if not destroys, the basis of the Court of Appeals' holding as to petitioner's " 'reluctance to manufacture munitions • • • not [as] a matter of religious belief, but merely a matter of preference,' and that Harshman subscribed to the beliefs and opinions of the Harshmanites."

Petitioner was just as positive in testifying or attempting to do so contrary to the holdings of the Court of Appeals. In that, he offered proof to the effect that it is NOT TRUE

> "that the Hearing Officer in 1954 concluded that in view of his employment with a concern producing material for military consumption he failed to sustain his claim with respect to non-combatant service; that his letter (*i.e.* Exhibit B-18 SR 55) is false when it states that the Department of Justice concurred with the Hearing Officer's recommendation that the registrant be granted a 1-A-O classification, but, to the contrary, the Hearing Officer accepted in that prior report the recommendation of the Justice Department that no member of the Harshmanite church or the Church of Jesus Christ can be given 1-O classification
>
> . . . that Mr. T. Oscar Smith's letter is false in the respect that it states that the defendant expressed an opinion or made a statement to the effect that he is not committing a violation of his Christian belief to manufacture goods for military consumption; . . . the company where he was employed for the past 8 years never manufactured anything other than material for civilian consumption although some of it, a small part of it, may be purchased by the government.
>
> . . . that he would under no circumstances, engage in the manufacture of any war materials . . . because that would be contrary to his belief and it would be clearly contrary to his mission on this earth . . . the church is a spiritual organization which never owned and does not now own a manufacturing establishment; that manufacturing establishment which employs him is an Illinois corporation which is owned by the stockholders and this manufacturing establishment as he observed in the last 8 years never manufactured any war goods, but was engaged solely in the manufacture of civilian goods.

> During the last 4 years while he was engaged as a salesman he personally never sold any of the candy to any of the military authorities or to the government . . . he believes that he and other church members do owe the government any service that it might demand that does not involve personal participation in the act of war . . ." (R 38 to 40)

Such employment cannot and ought not be considered a basis in fact for the board's denial of his prima facie established claim for 1-O classification. Nor can his employment as a salesman for a candy factory be considered a basis in fact for the board's classifying him as 1A-O, contrary to his claim for full exemption based on his religious training and belief. Petitioner admits that some of the candy which he was handling as salesman may have been purchased by the Government. Nevertheless, he says that even then his employment is not basis in fact as that term was considered by this Court in *Dickinson, Sicurella, Witmer* and *Gonzales* and other cases wherein the term became material.

It appears to the Petitioner that this Court's distinction between wars and theocratic wars is apropos here and it requires just a logical paraphrasing to support Petitioner's contention. This Court said that a draftee's willingness to fight at Armageddon does not indicate his willingness to participate in war because:

> "Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets. We believe the reasoning of the Government in denying petitioner's claim is so far removed from any possible congressional intent that it is erroneous as a matter of law." *Sicurella* v. *United States*, 348 U.S. 385, 75 S.Ct. 403, 406.

The Government's evidence, Exhibit B-18 & 36 (SR 55 & 69)—so heavily relied on by the Court of Appeals, even though it is an *ex parte* document—shows that Petitioner and other members of the Church of Jesus Christ of Sullivan, Illinois are "strangers in the land"—if not of the Philistines,—then that of the people of Sullivan. It is clear that even though strangers they be, they must find work so that they may live; however, their religious training requires them to labor in accordance with their own beliefs. The Community Industries gives them that opportunity and possibility. To deprive Petitioner of his *prima facie* established claim to exemption from all military service because he was so employed, would be to say to him that he must choose between starving or forfeiting his right to follow his conscience.

The Court of Appeals for the Seventh Circuit itself held that such choice cannot be exacted even from a conscientious objector when it decided *U.S.* v. *Wilson*, 215 F. 2d 443, wherein Wilson:

> "When asked a hypothetical question as to whether he could continue his job, *i.e.*, as a railroad telegraph operator, if he knew that the trains operated by the railroad were carrying troops to combat service, he stated that he would do so unless the battle front was near his place of employment. When asked how, as a part of his job, he could assist in the routing and scheduling of trains carrying troops to the west coast for overseas combat duty, he stated that so long as he was not told directly that such was their destination he could see no relation between his job and the war effort. He stated finally that there was no capacity in which he could serve so long as it required wearing the uniform of the United States."

The Court, disagreeing with the Government's contention that such employment disqualifies Wilson as a conscientious objector held that:

"Neither do we think the defendant's employment as a railroad telegraph operator was in any way inconsistent with his claim to exemption as a conscientious objector. Section 6(j) of the Act, 50 U.S. C.A. App. Sec. 456(j), provides exemption for persons conscientiously opposed to 'participation in war in any form.' *It would be wholly unrealistic to construe this langauge to mean that a person whose civilian employment indirectly contributed to the war effort could not, therefore, meet the statutory test for exemption.* Such a construction of the Act would completely nullify the provisions granting exemption to conscientious objectors, for *it is difficult to conceive of any gainful activity which in periods of extensive mobilization and training, would not in some manner aid the common purpose.* Moreover, *the Act expressly recognizes that one may engage in civilian work contributing to the national welfare without thereby losing the right to be classified as a conscientious objector.* Section 6(j) provides that persons conscientiously opposed to noncombatant service in the armed forces shall be ordered to perform 'such civilian work contributing to the maintenance of the national health, safety, or interest as may be considered appropriate by the local board.' It is perfectly clear in this case that the nature of the defendant's civilian occupation could not be a basis in fact for denying him the status of a conscientious objector." (Emphasis ours.)

If we juxtapose the decision of the Court of Appeals for the Seventh Circuit in the *Wilson* and in this case, we must conclude that that Court discovered how to dance *pas de deux* by itself. No composer ever thought that one person can take simultaneous steps in opposite directions. The Court of Appeals here was able to do so.

We submit that the Court of Appeals was correct when it decided the *Wilson* case but grievously erred to

the prejudice of the Petitioner in this case. The present holding would make it impossible for any conscientious objector ever to be engaged in any activity which may—however remotely—contribute to the war effort. In fact, a conscientious objector, if the present holding of the Court of Appeals stands, would have to refuse to pay his taxes to the federal government since a large portion of it goes to buy bullets, polaris missiles, hydrogen bombs and other destructive implements of war. This cannot be what Congress had in mind and we are hopeful that this Court will establish clearly by its reversal of the instant case that the law of the land is not as was interpreted by the Court of Appeals.

The pastor of the church wrote to petitioner's Draft Board and the writing was introduced by the government as Exhibit B-3 (SR 28). The pastor's statement, we submit, sums up the problem because,

> "If it is wrong to produce anything which is helpful to the government in time of war then it is wrong to engage in farming at such a time. In fact, logic would force one at such a time to refuse to engage in any constructive effort. . . ."

Petitioner submits that this Court should declare that his and other innocuous employments, even though helpful to the government, is no basis in fact to deprive one of conscientious objector classification, who *prima facie* established that he is entitled to it. The judgment of the Court of Appeals ought to be reversed.

III.

THE LOCAL BOARD WHILE RECOGNIZING PETITIONER'S SINCERITY IN CLAIMING EXEMPTION FROM ALL MILITARY SERVICE, REFUSED TO GRANT HIM THE REQUESTED CLASSIFICATION ON ADMITTEDLY ILLEGAL GROUNDS. THE APPEAL BOARD CONSIDERED HIM DE NOVO AND LET THE LOCAL BOARD'S CLASSIFICATION STAND. DID THIS DE NOVO CLASSIFICATION OVERCOME THE LOCAL BOARD'S ILLEGAL CONDUCT AND DID IT MEND THE LACK OF DUE PROCESS?

The government introduced into evidence petitioner's Selective Service file including Exhibit B-11 (SR 45). This exhibit was prepared by him following his personal appearance before the local board (R 36 & 40). He did recapitulate the conversation that he had with the local board members as it transpired the day before and the recapitulation was never challenged by the government (R 41). Petitioner testified that:

> "following my appearance before the draft board I did prepare a summary of the discussion that I had with the board members. The summary is in my file (Exhibit B-11). I remember a draft board member by the name of Clancy. I had a conversation with him during my personal appearance." (R 36)

When petitioner was asked the question what the conversation was with board member Clancy, the government objected and the objection was sustained.

As to his second appearance before the board, the petitioner offered proof to the effect that when he asked a board member what is he to do to receive a 1-O classification the answer was that as far as the board member was concerned "there was no such thing as a conscientious objector opposed to both combatant and non-combatant service." That the acting chairman of the board spoke up at the same hearing that to get the classification of 1-O he would have to leave the country, that the chairman believed on the basis of his own traveling that

the best place for the registrant would be to go to Canada. He further asked the draft board members whether or not they believed in his sincerity as a conscientious objector and they unanimously stated that they certainly did. (R 41)

Government Exhibit B-11 (SR 45) gives in more detail petitioner's conversation with his draft board members. Government Exhibit 29 written by petitioner (SR 63-64) again refers to petitioner's conversation with draft board members. According to this the chairman of the board, McNutt, gave the reason

> "that since the board had placed the other members of my church in I-A-O he did not feel that my case should be made the exception."

Also, Mr. Saxton, a member of the board stated "other boys in Sullivan had to serve two years and he did not see why we thought we could get out of it." Mr. McNutt further stated that he did not feel that he should send other boys and let us stay home, as he put it."

Petitioner argued before the Court of Appeals that such reasoning and the resultant classification based on such reasoning clearly indicates that the denial of his 1-O classification, theretofore prima facie established, was based neither on law nor on the rules and regulations of Selective Service. However, the Court of Appeals did not even inquire into whether the local board's action was contrary to due process or otherwise in violation of the law because of the alleged *de novo* classification by the Appeal Board. The Court of Appeals said on this point (Parker R 64) that:

> "The Local Board clerk testified that the Board 'felt they were doing their best to acknowledge the registrant's religion * * *' and thus, according to

> Harshman, showed that emotion rather than the law permeated the Local Board proceeding. The only relevant issue before us in this case is the classification of the Appeal Board in its independent, *de novo* proceeding. This proceeding superseded the Local Board's hearing because there is nothing to show that the prejudice of the Local Board, if any, corrupted the decision of the Appeal Board. *United States* v. *Van Hook*, 7 Cir., 284 F. 2d 489, reversed and remanded for resentencing, 365 U.S. 609 (1961" Parker R 64).

We have no quarrel with the holding that the Appeal Board's classification superseded that of the local board; however, we respectfully disagree with the holding of the Court of Appeals that

> ". . . there is nothing to show that the prejudice of the Local Board, if any, corrupted the decision of the Appeal Board. . . ."

There is no denial, as there cannot be, that the local board denied his claim to 1-O classification on some extraordinary nonlegal grounds. The Appeal Board that did not have a chance to see him, nor had a chance to talk to him, classified him *de novo*, but *mirabile dictu* left him in the selfsame classification that was given to him by the local board. However, can it be gainsaid that the clearly expressed bias and prejudice of the local board carried over to and was made its own by the Appeal Board and in consequence, the so-called classification *de novo* was but a sham and nothing more.

Petitioner also submits that the Department of Justice's recommendation, brimming with false statements, did influence the Appeal Board to his great prejudice. Petitioner attempted to testify in detail as to the falsehoods contained in Government's Exhibit B-18 and 36 (SR 55 and 69) and when his testimony was not admitted

because of government's objection (R 36), he made an offer of proof as to the falsehoods contained in the Department of Justice's recommendation B-18 and 36 (R 38 and 44).

In Government's Exhibit B-19 (SR 73-76) he challenged at least in part the statements made by the Department of Justice in Exhibit B-36 (SR 69-72).

The Court of Appeals seemed to have adopted the argument presented by the Government that since Harshman did not contradict the Government's Exhibit B-36 (SR 69) point by point, thereby he is precluded from challenging it in toto, at the time of his trial. Petitioner does not believe that this Court will hold him to such strict limitation, knowing that he is not tutored in law and only finished high school (R 35). He believes that the court will not hold him to that strict rule since he was not and could not have been prepared to comply with the strict rules of legal procedure. He was working as a salesman and when he was confronted with the need of answering Government's Exhibit 36 (SR 69) he was 20 years of age (R 32 and SR 39).

In *Conley* v. *Gibson*, 335 U.S. 41, 78 S.Ct. 99, this Court said:

> "The federal rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

Query: If one misstep by counsel may not do away with a proper decision on the merits, how can a misstep by this untutored petitioner be held against him to the extent that his case be not judged on the merits.

This Court answered this question just recently when in *Foman* v. *Davis*, 83 S.Ct. 227 (1962) it said:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley* v. *Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed. 2d 80. The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1."

In footnote No. 5 of *Simmons* v. *United States*, 348 U.S. 397, 75 S.Ct. 397 on page 401, this Court held that:

> "Registrants are not to be treated as though they were engaged in formal litigation assisted by counsel. *United States ex rel. Berman* v. *Craig*, 3 Cir., 207 F.2d 888; *Smith* v. *United States*, 4 Cir., 157 F.2d 176."

Petitioner submits his hope, bolstered by the prior decisions of this Court, that the judgment against him will not be permitted to stand because the same is bottomed not on evidence, but rather on guesses on the part of the Court of Appeals and further because there is the red thread of bias and prejudice entwined throughout the proceedings. He was deprived of the due process of law when the court speculated and guessed that the bias of the draft board (if any) "may not" have prejudiced him at all. Not to reverse the judgment of the Court of Appeals for the Seventh Circuit would be tantamount to speculate and guess petitioner into the penitentiary. Petitioner believes that this Court will not permit that to happen therefore, he asks that the judgment of the Court of Appeals be reversed.

IV.

THE TRIAL COURT ERRED TO THE GREAT PREJUDICE OF PETITIONER WHEN IT RULED THAT HE MAY NOT PRESENT EVIDENCE WHICH ATTEMPTED TO OVERCOME THE GOVERNMENT'S EX PARTE STATEMENT ALLEGING THAT HIS EMPLOYING COMPANY WAS MANUFACTURING IMPLEMENTS OF WAR. THE COURT OF APPEALS UPHOLDING THE TRIAL COURT ERRED SIMILARLY.

The opinion of the Court of Appeals for the Seventh Circuit holds (Parker-R 63) that:

> "Harshman also relies upon *Batterton* v. *United States*, 8 Cir., 260 F.2d 233 (1958), which is not in his favor on the facts before us. And each case must 'of necessity be based on the particular beliefs of the individual.' *Sicurella* v. *United States*, 348 U.S. 385, 390 (1955). The court there said the record 'does not even by indirection,' deny Sicurella's sincere religious beliefs. Harshman argues the record here as to him is like that record as to Sicurella. But Sicurella's sincerity was admitted and the court said 'we are therefore relieved of the task of searching the record for basis in fact to support a finding of insincerity.' p. 388."

The above must be read to the effect that while Sicurella's sincerity was admitted Harshman's was not, even though the record is just to the contrary. The record shows that in those two instances where petitioner had the privilege of a personal appearance, that is before the Local Board and before the Hearing Officer of the Department of Justice, there was a positive finding that he was sincere. These two findings never were challenged or contradicted in any part of the record. Therefore, petitioner submits that the teaching of the *Sicurella* case applies to him, since his sincere religious beliefs were not

denied "not even by indirection", just as there was no such denial in the *Sicurella* case.

The Court of Appeals (Parker R 63) sees

> ". . . no inconsistency in the Department of Justice and the Board recognizing Harshman's sincerity of religious belief and the classification based on the admitted fact of his willingness to participate in the production of war goods."

Petitioner protests, as he protested before the Court of Appeals, that there was never any admission on his part but to the contrary, he claimed and attempted to show that it was NOT A FACT and that he was NOT WILLING to produce war goods. Where did the Court of Appeals find such alleged "admitted facts". The opinion of the Court of Appeals gives us the answer because it states (Parker-R 63) that:

> "The Department of Justice recommendation discloses Harshman's view that 'it would not be considered immoral or a violation of their Christian duty to manufacture ammunitions * * *.' This fact would suffice to rebut Harshman's prima facie showing."

So it is as petitioner repeatedly claimed, nothing but the *ex parte* recommendation emanating from the Department of Justice which discloses what the Court of Appeals pleases to call "admitted facts." It's strange, because it is contrary to every precept of criminal procedure and theory underlying it in our jurisprudence, to permit the prosecution to present an *ex parte* statement which allegedly discloses the "view of the accused." It is strange because it is contrary to all precepts that we know of, to accept such *ex parte* statement of the prosecution when the defendant attempted to present evidence in contradiction of such prosecution's statement and when his evidence was rejected by the trial court because of government's objec-

tion. The proof by petitioner denying the veracity of the prosecution's *ex parte* statement was similarly rejected. The Court of Appeals seems to be entirely oblivious of petitioner's proffered denial of the truth of the "Department of Justice recommendation" and therefore, one wonders what are the facts remaining which the Court of Appeals held to "suffice to rebut Harshman's prima facie showing."

The opinion of the Court of Appeals is a haunting one because there is a "leitmotiv" therein which perforce, reminds one of Aesop's Fables (with due apologies where apologies are due). One is reminded of Aesop's little lamb who was accused by the wolf of having disturbed the wolf's drinking water in the flowing river. The fact that the lamb was drinking below the wolf was for naught, because it may have been the lamb's brother who did the thing charged against the poor little lamb. The fact that the little lamb had no brother was held for naught, because no argument of his was to be considered since the wolf had the strength to make his accusation stick, however baseless those accusations were.

The haunting picture does not disappear, but to the contrary, it comes into strong relief when the Court of Appeals for the Seventh Circuit holds that the Department of Justice recommendation submitted *ex parte* and attempted to be contradicted by petitioner nevertheless is considered to be "fact (which) would suffice to rebut Harshman's *prima facie* showing."

Petitioner submits that the Court of Appeals should have inquired why the true facts as to the content of his religious belief were not permitted by the trial court to be disclosed. Why, when he challenged the Department of Justice recommendation and when in support of his challenge he asked

for an order to produce the Hearing Officer's report, did the prosecution object and was the objection sustained? (R 22, 23). Petitioner earnestly says that it was a prejudicial error and a grave one at that for the trial court to limit the testimony of his witness, Hagerman (R 25), and it was a further grave error to reject the offer of proof submitted on behalf of this witness (R 30). It was error to prevent petitioner from testifying in rebuttal of the allegations of the Department of Justice recommendation (Exhibit B-36, SR 69) and it was a further error to reject his offer of proof which unambiguously and head-on challenged the statement of the Department of Justice (R 38). That it was prejudicially erroneous on the trial court's part to prevent petitioner from presenting such testimony is clearly shown by the fact that the Court of Appeals was misled because of the absence of such testimony and accepted "non-facts" as "facts", as in George Orwell's "1984" "newspeak" permits peace to be equated with war, honor with dishonor, etc. Petitioner submits that the Court of Appeals erred when it held (Parker-R 63) that unsubstantiated evidence presented by the government *ex parte* in the form of the recommendation of the Department of Justice (B-36, SR 69) did overcome and rebut his prima facie showing. However, the petitioner calls this Court's attention to that sentence in the Court of Appeals opinion where it is said that "this fact would suffice to rebut Harshman's prima facie showing." This sentence clearly indicates, whether by inadvertence or otherwise, that the Court of Appeals admitted that petitioner made a "prima facie showing" as to his claim to full exemption from military service (1-O) and therefore, he does not feel it necessary to belabor the point of his *prima facie* case. He will not belabor the absence of basis in fact because he believes that he has shown

that no basis in fact exists which would justify the denial of his *prima facie* established claim to 1-O classification and he submits therefore that the judgment of the Court of Appeals for the Seventh Circuit upholding the judgment of trial court ought to be reversed.

V.

THE SENDING OF THE SELECTIVE SERVICE FILE TO THE JURYROOM WAS AN ERROR PARTICULARLY BECAUSE THE TRIAL COURT PREVENTED PETITIONER FROM EXPLAINING THE CONTENT THEREOF.

Petitioner complained before the Court of Appeals for the Seventh Circuit that he was prejudiced by the trial court's ruling pursuant to which he was prevented from testifying about certain documents in his Selective Service file while the trial court permitted the jury to have the file before it.

In reviewing this matter the Court of Appeals said that the trial court

> ". . . erred in permitting the S.S.S. file to go to the jury, for, as the court in *Cox* said, ' * * * nothing in the file is pertinent to any issue proper for jury consideration.' But we see no prejudice from this fact since the jury had already heard oral testimony of the substance of its contents." (Parker R 65).

Petitioner submits that the logic or illogic of the above holding is not the law, particularly not because it was the prosecution which introduced on oral testimony the contents of the Selective Service file and to boot, over the strenuous objection of petitioner (R 11 and 12). Petitioner believes and so submits that the trial court erred when thereafter, because the objection of the government prevented his witness, Hagerman (R. 25) to testify about the selfsame documents which were so introduced by the

government (R 36 and 37). Certainly, petitioner should have been given the opportunity to explain what was within the file after the court, in front of the jury, admitted the file into evidence (R 12). It seems that the Court of Appeals believes that the ADMITTED ERROR of sending the file to the jury was remedied because the jury was permitted to learn about the file by oral testimony too. Petitioner believes that this compounds the error because if the jury had no business to peruse the Selective Service file it had no business to hear oral testimony concerning it.

The Court of Appeals sees no prejudice resulting from the jury seeing the file. The "eye of vigilance" of the Court of Appeals does not reach far enough because it is impossible to fathom how much the jury's mind was influenced by the voluminous Selective Service file before it. Petitioner believes that the jury had to be influenced against him when the file was sent out for its inspection and particularly after it heard the court's ruling that petitioner may not testify about the file nor was he permitted to explain the contradictory documents in it. Such a ruling did undoubtedly convince the jury that the weighty documents are sacrosanct, and pursuant thereof, the petitioner perforce had to be found guilty.

Petitioner argued before the Court of Appeals and argues now that the sending of the files to the jury gravely prejudiced him. The prejudice resulted from a pyramiding of the trial Court's erroneous ruling. Firstly, the jury heard oral testimony about the Department of Justice recommendation to the Appeal Board (B-36, SR 69-72) however, he was not permitted to present testimony that such exhibit contained many misstatements, falsehoods, particularly with reference to what petitioner allegedly said to the Hearing Officer of the Department of Justice and what such Hearing Officer said to him (R 37). Sec-

ondly, the jury was permitted to hear testimony and was given the opportunity to see Government's Exhibit B-39 (SR. 73) however, petitioner was not permitted to give testimony what, in his remembrance, the actual conversation was between him and the draft board. Petitioner submits that such and other similar rulings of the trial court pertaining to the Selective Services file could not but prejudice the jury against him and the Court of Appeals is in error when it was unable to see such resulting prejudice.

Petitioner recognizes that the trial court attempted, by its instructions, to make it clear to the jury that the classification given to him is not before it, however, there was never any explanation given to the jury what it ought to do with the file. Was it to be expected that the jury is going to peruse the file but it will close its eyes when it came to the matter of classification. How can that be done by the jury or anyone else, since the whole of the file pertains to petitioner's classification and to nothing else. We believe that the jury did consider the classification and therefore, the file before it resulted in grave prejudice to him as it was said by this Court in *Cox* v. *United States*, 332 U.S. 442 (1947) 457, 68 S.Ct. 115. In that case this Court, in footnote No. 4 refers to *Smith* v. *United States*, (4th Cir.) 157 F.2d 176. In the *Smith* case the Court of Appeals for the Fourth Circuit, according to the footnote

> "held that the submission of the issue of classification to the jury constituted reversible error."

Because this Court so quoted *Smith* v. *United States* with approval, petitioner submits that on the ground that the jury had the Selective Service before it, the judgment of the Court of Appeals for the Seventh Circuit ought to be reversed.

VI.

PETITIONER WAS PREJUDICED BY THE TRIAL COURT'S REFUSAL TO ORDER THE GOVERNMENT TO PRODUCE THE HEARING OFFICER'S REPORT WHEN SUCH REPORT WAS REFERRED TO IN A GOVERNMENT EXHIBIT IN EVIDENCE AND WHEN THE TRUTHFULNESS OF SUCH EXHIBIT WITH REFERENCE TO THE HEARING OFFICER'S REPORT WAS CHALLENGED BEFORE THE TRIAL COURT.

The government introduced into evidence Exhibit B-36 (SR 69), the letter sent by the Department of Justice to the Appeal Board which concludes that

> ". . . he recommended that registrant (meaning the petitioner) be granted a 1-A-O classification." (SR 71)

This exhibit begins with reference to Section 6 (j) of the Universal Military Training and Service Act pursuant to which

> ". . . an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant (i.e. petitioner) by Mr. F. M. Brittingham, a Hearing Officer for the Department of Justice." (SR 69).

The same exhibit then underlines that

> "The information obtained from the inquiry and considered by the Department of Justice in arriving at its recommendation is contained in the Résumé of the Inquiry attached hereto and made a part hereof."

The Résumé referred to appears as SR 66-68 and makes no mention whatsover what the Hearing Officer reported to the Department of Justice. In the body of Exhibit B-36 (SR 69-72) reference is made to the alleged statements made by petitioner before the Hearing Officer and to the alleged statements of the Hearing Officer to petitioner.

In Government's Exhibit 39 (SR 73-76) petitioner contradicts many of the alleged statements which were imputed to him in Government Exhibit B-36 and those contradictions fully justified his motion for an order upon the government to produce the Hearing Officer's report. The trial court was however, to the contrary opinion and defendant's counsel was not permitted to cross-examine the draft board clerk who testified for the government (when introducing the Selective Service file), and he was not permitted to ask this witness whether the Brittingham report referred to in Government Exhibit B-16 is in the Selective Service file (R 13). Petitioner moved that the government be ordered to produce the Brittingham report but the trial court refused (R 22). When petitioner renewed his motion to produce on the ground that B-36 (SR 69) is not a fair résumé of the Hearing Officer's report and when he again moved for production for the purpose of clarifying the contradictions existing between B-36 and B-39, (both introduced by the government), the motions were denied (R 23).

In the face of the above statement of the record, the holding of the Court of Appeals for the Seventh Circuit is *non sequitur* when it says

> "There was no error in the District Court's ruling which precluded production of the Department of Justice hearing officer's report and no error in denying the motion for acquittal on this ground. Neither the Act nor the regulation, since 1952, requires the report placed in the file. *Gonzales* v. *United States*, 364 U.S. 59 (1960)."

This holding is *non sequitur* because petitioner did not claim that the Hearing Officer's report is to be made part of his Selective Service file irrespective of whether that file was made up before or after 1952. However, he main-

tains that this Court did not hold in *Gonzales* v. *United States*, 364 U.S. 59 as the Court of Appeals seems to read that opinion. To the contrary, in reading the *Gonzales* case of 1960, and applying it to the record here, that case teaches that petitioner's motion to produce the Hearing Officer's report should have been granted. This Court held that:

> "... petitioner has failed to show any particular need for the report and notes. While there are now allegations of the withholding of 'favorable evidence developed at the hearing' and a denial of a 'full and fair hearing,' no such claim was made by petitioner at any stage of the administrative process. Moreover, his testimony at trial never developed any such facts. *In the light of these circumstances*, as well as the fact that the issue at trial in this respect centered entirely on the Department's recommendation, which petitioner repudiated but which both the appeal board and the courts below found supported by the record, we find no relevancy in the hearing officer's report and notes." (page 1557) (emphasis added)

In the *Gonzales* case, petitioner presented no challenge "at any stage of the administrative process" while petitioner did so point-blank when he put into his file Exhibit B-39 (SR 73-76).

In the *Gonzales* case the "testimony at trial never developed any" facts which would have shown the withholding of "favorable evidence developed at the hearing." In the instant case, to the contrary, petitioner developed or attempted to develop testimony to show that "favorable evidence developed at the hearing" before the Hearing Officer was obscured and was denigrated by the Department of Justice report to the appeal board. (R 20, 23, 24, 27, 31, 37). Petitioner submits that in "*the light of these circumstances*" as well as the" facts developed or which could have been developed but for the erroneous ruling

by the trial court, the Hearing Officer's report should have been ordered to be brought into court.

During the trial when petitioner was not permitted to testify, he offered proof (R 38-41) which has shown without peradventure of doubt that Government's Exhibit B-36 (SR 69) with reference to the hearing before the Hearing Officer was false. The offer of proof denied that the Hearing Officer made the statements attributed to him in Government's Exhibit B-36 and denied the statements attributed to petitioner before the Hearing Officer in the selfsame exhibit.

Under the circumstances of this case, the Hearing Officer's report was the very basis for the Department of Justice recommendation (B-36, SR 69). The repudiation of the statements in that exhibit put the Hearing Officer's report clearly in issue and in consequence the relevance and materiality thereof was plainly established. Due process and the requirement of fair hearing made it mandatory for the trial court to order the production of the Hearing Officer's report. Its failure to do so was prejudicial error.

Selective Service regulation 1626.25 (procedure followed by the appeal board) makes it clear that that board should make its determination on the COMPLETE PRESENTATION OF THE FILES. There was no such presentation because while the file contained the Department of Justice recommendation (B-36, SR 69), it contained neither a fair résumé nor the original report of the Hearing Officer. The challenge by petitioner to Exhibit B-36 undoubtedly put him in a prejudicial position before the Appeal Board because there was nothing before that board to prove whether the challenge was justified or not. Because of the hiatus in the record, the Appeal Board was compelled to make a choice and it did make the choice in disfavor of petitioner. The choice was

whether to assume that the Department of Justice recommendation (B-36 SR 69) was a factual and truthful one notwithstanding petitioner's challenge, or whether petitioner was sincere and honest in his challenge notwithstanding the statement contained in Government's Exhibit B-36 which pertained to the Hearing Officer's report. Petitioner says that he was prejudiced and the prejudice can be seen from the fact that the Appeal Board ruled against his claim for full exemption from military service and it undoubtedly did so by concluding that his challenge directed towards Exhibit B-36 was not an honest one and therefore, that board must have further concluded that his sincerity as a whole must be found wanting. The prejudice so created by the trial court's refusal to order production of the Hearing Officer's report was great and irremediable. The prejudice was created by the trial court's refusal to order production of the report and therefore, it must be held that the Court of Appeals for the Seventh Circuit erred when it found "no error in the District Court's ruling which precluded production of the Department of Justice Hearing Officer's report." The judgment of the Court of Appeals ought to be reversed.

CONCLUSION

In *Franks* v. *United States*, 216 F.2d 266, Judge Pope, speaking for the unanimous United States Court of Appeals for the Ninth Circuit, involving an alleged Selective Service law violation, stated a truism that

> "In a criminal prosecution of this kind, the burden is upon the Government to establish the validity of the induction order, and if the matter which we here mention has a bearing upon that validity, (which we will discuss hereafter), then we must view the record in the light most favorable to the appellant as we proceed to construe its meaning."

In the case of *Manke* v. *United States*, 259 F.2d 518, the conviction of Manke, charged with violating the Selective Service Act, was reversed because the court thought:

> ". . . that in view of the entire history of this case as shown by the record, and in view of the fact that the Appeal Board had no new evidence before it adverse to appellant's claim of conscientious objection, it would be unrealistic not to conclude that the Appeal Board, in classifying appellant as 1-A was influenced largely if not wholly by the recommendation of the Department of Justice. *Goetz* v. *United States*, 9 Cir., 216 F.2d 270. Since the recommendation, being made a part of the résumé, was founded on a mistaken assumption of fact we hold that its consideration by the Appeal Board amounted to a denial of procedural due process, and therefore appellant was entitled to a judgment of acquital."

In the case of *Kretchet* v. *United States*, 284 F.2d 561 (1960), the United States Court of Appeals for Ninth Circuit considered the matter "in the light of the teachings in *Sicurella* v. *United States*, 348 U.S. 385, 75 S.Ct. 403," and quoted therefrom to the effect that

> "The test is not whether the registrant is opposed to all war, but whether he is opposed on religious grounds, to *participation* in war."

That test clearly applies to petitioner.

Petitioner submits that the holding of the *Kretchet* case clearly applies to him when in that case the United States Court of Appeals for the Ninth Circuit said:

> "We are unable to determine from the record whether the board, in refusing to sustain appellant's claim for exemption, did so because of appellant's lack of sincerity, or because it believed that appellant's conscientious objections were not based upon religious training and belief, or because appellant was not opposed to war in any form, or whether such action was based upon all three grounds, or on two of them. The advice given by the Department of Justice to the appeal board that it could refuse to sustain appellant's claim for exemption on the ground that he was not opposed to war in any form, in our view, was clearly erroneous and fatally infected the adverse recommendation of the Department of Justice."

This Court speaking of the requirements of due process in *Palko* v. *State of Conn.*; 302 U.S. 319, 58 S.Ct. 149, held that:

> "Fundamental too, in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after a fair trial. The hearing, moreover, must be a real one, not a sham or pretense."

Petitioner sorrowfully says that the Department of Justice in prosecuting him and further in submitting a non-factual recommendation to the Appeal Board forgot its motto, *qui pro domina justitia sequitur*. If it did not forget it then it did not apply it in this case because this prosecution was surely not on behalf of justice.

The trial court, petitioner submits, was prejudiced against him as it may be seen from the ruling of that court

when it restricted his defense counsel in his opening statement. The prejudice clearly appears upon the reading of the colloquy between the court and counsel as it appears on R 5 to 8 and again on 9 and 10. Petitioner earnestly suggests to this Court to look upon the Transcript of Record so indicated and also upon the exclusion of petitioner's proffered instructions to the jury which were rejected by the trial court upon the objection of the government. Petitioner particularly complains that the trial court refused to give instructions on bias and prejudice of the Local and of the Appeal Boards. (defense instructions O, P and Q (R 57 and 58)).

Petitioner submits that in line with the holdings of the various Courts of Appeals hereinbefore referred to (except the holding of the Court of Appeals for the Seventh Circuit but including the holding of that court in the *Wilson* case), the judgment of the Court of Appeals for the Seventh Circuit must be reversed because his trial was not in accordance with the concept of due process and because his trial was not fair but simply a sham and pretense of a trial.

> ". . . A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done . . . Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice." *Rex* v. *Sussex Justices*, 1 K.B.D. (1924) at 259.

Petitioner submits that in his case justice was not done and it is manifest and on the record undoubted that such is the case. For that reason alone, though there are a great many others heretofore argued, the judgment of

the Court of Appeals for the Seventh Circuit ought to be reversed.

Respectfully submitted,

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APPENDIX.

50 U.S.C. 462; 62 Stat. 622—OFFENSES AND PENALTIES.

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title (sections 451-454 and 455-471 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title (said sections), rules, regulations, or directions who shall knowingly make, or be a party to the making of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title (said sections), or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title (said sections), or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title (said sections), or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title (said sections), or rules, regulations, or directions made pursuant to this title (said sections), or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this (said sections) or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such of-

fenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title (said sections) unless such person has been actually inducted for the training and service prescribed under this title (said sections) or unless he is subject to trial by court martial under laws in force prior to the enactment of this title (June 24, 1948). Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall, upon request of the Attorney General, be advanced on the docket for immediate hearing. . . . . June 24, 1948, c. 625, Title 1, p. 12, 62 Stat. 622.

PART 1622—CLASSIFICATION RULES AND PRINCIPLES

General Principles

1622.1 *General Principles of Classification.*—(a) The Universal Military Training and Service Act, as amended, provides that every male citizen of the United States, every male alien admitted to the United States for permanent residence, and every male alien who has remained in the United States in a status other than that of permanent resident for a period exceeding one year, who is between the ages of 18 years and 6 months and 26 years, shall be liable for training and service in the Armed Forces of the United States, and that persons who on June 19, 1951, were or thereafter are, deferred under the provisions of clause (A) or clause (C) of section 6(c)(2) of such Act shall remain liable for training and service until they attain the age of 28, and that persons who on June 19, 1951, were, or thereafter are, deferred under any other provision of section 6 of such Act shall remain liable for training and service until they

attain the age of 35. Certain exemptions and deferments are specifically provided; others are authorized to be provided by regulations promulgated by the President.

(b) Classification is the key to selection and it must be accomplished in the spirit of the Universal Military Training and Service Act, as amended, in which the Congress has declared "that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form No. 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious or other organization. Each such registrant shall receive equal justice.

1622.2 *Classes.*—Each registrant shall be classified in one of the following classes:

CLASS I

Class I-A: Available for military service.

Class 1-A-O: Conscientious objector available for noncombatant military service only.

Class 1-C: Member of the Armed Forces of the United States, the Coast and Geodetic Survey, or the Public Health Service.

Class 1-D: Member of reserve component or student taking military training.

Class 1-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.

1622.11 *Class I-A-O: Conscientious Objector Available for Noncombatant Military Service Only.*—(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

1622.14 *Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any

form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

1622.16 *Class I-W: Conscientious Objector Performing Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*—(a) In Class I-W shall be placed any registrant who has entered upon and is performing civilian work contributing to the maintenance of the national health, safety, or interest, in accordance with order of the local board.

(b) In Class I-W shall be placed any registrant who subsequent to being ordered by the local board to perform civilian work contributing to the maintenance of the national health, safety, or interest has been released from such work by the local board after satisfactorily performing the work for a period of twenty-four consecutive months or has been sooner released from such work by the Director of Selective Service under the provisions of section 1660.21 of this chapter. Each such registrant shall be identified on all records by following his classification with the abbreviation "Rel." and, upon attaining an age beyond the maximum age of liability for military service under the provisions of the selective service law, all such registrants shall be reclassified in Class V-A.

PROCEDURE FOLLOWED BY APPEAL BOARD

1626.26 *Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall tentatively determine whether or not the registrant is eligible for classification in a class lower than Class I-O or in Class I-O. If the appeal board finds that the registrant is eligible for classification in Class I-O or in a lower class, it shall place him in the appropriate class.

(b) If the appeal board tentatively determines that the registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(c) No registrant's file shall be forwarded to the United States Attorney by any appeal board unless the record on the Classification Questionnaire (SSS Form No. 100) shows and the letter of transmittal states that the appeal board reviewed the file and tentatively determined that the registrant should not be classified in Class I-O or in a lower class. Any file forwarded to the United States Attorney without the information required by this paragraph shall be returned to the appeal board.

(d) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraphs (b) and (c) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall

be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(e) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant together with a letter advising the registrant that, within thirty days after the date of such mailing, he may file with the appeal board a written reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant.

SECTION 6 (j) OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, 50 U.S.C.A. APPENDIX § 456 (j):

"Nothing contained in this Title (Sections 451-454 and 455-477 of this Appendix) shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, that does not include essentially political, sociological, or philosophical views or a merely personal moral code. • • •"